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No. 03 48

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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131 pp

QUESTIONS PRESENTED

1. Decisions of administrative agencies are normally entitled to substantial deference from reviewing courts. Should that same degree of deference be accorded when the agency is selling licenses so as to become, in effect, an interested party in the licensing process?

2. When an administrative agency issues licenses by competitive bidding, must it abide by the stated terms of the bidding process, or may it modify those terms after the auction if doing so will net it a higher yield?

PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were the petitioner here (Biltmore Forest Broadcasting FM, Inc.), the Federal Communications Commission, and intervenors Liberty Productions, L.P., and Orion Communications, Ltd.

Biltmore Forest Broadcasting FM, Inc., is a closely held North Carolina corporation without any subsidiaries or parent companies. No parent or publicly held company owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

Questions Presented i
Parties and Rule 29.6 Disclosures ii
Table of Contents iii
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Regulations Involved 1
Statement of the Case 2
Factors Warranting *Certiorari* 7
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Page

Cases:

Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F. 3d 155 (2003) 1
Bowles v. Seminole Rock Co., 325 U.S. 410 (1945) 13
Erie Coke and Coal v. U.S., 266 U.S. 518, 520 (1925) 13
Escoe v. Zerbst, 295 U.S. 490, 493 (1935) 10
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) 14
High Plains Wireless, L.P. v. FCC, 276 F. 3d 599, (C.C. Cir. 2002) 15
Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 8
McKay v. Wahlenmeier, 226 F. 2d 35 (D.C. Cir. 1996) 11, 12
MCI Telecommunications Corp. v. FCC, 765 F. 2d 1186 (D.C. Cir. 1985) 10

Federal Communications Commission v. Nextwave Personal Communications, Inc., 537 U.S. 293 (2003) 14, 15
Piper v. Chris Craft Industries, 430 U.S. 1, 42 (1977) 13
Superior Oil Co. v. Udall, 409 F. 2d 1115 (D.C. Cir. 1969) at 1121 ..... *Passim*
Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) 16

Statutes and regulations:

28 U.S.C. 1254(1) 1
47 C.F.R. 1.1205(b) (1998) 1
47 C.F.R. 1.2101 (1998) 2
47 C.F.R. 1.2105(a)(2)(B) (1998) ..... *Passim*
47 C.F.R. 1.2105(b) (1998) 5
47 C.F.R. 1.2108 (1998) 5
47 C.F.R. 73.5001 (1998) 2
47 C.F.R. 73.5002 (1998) 1, 2, 9

Miscellaneous:

FCC Report to Congress on Spectrum Auctions, 1997 Lexis 7490 (Oct. 9, 1999) 11
FCC Public Notice – Closed Broadcast Auctions, DA-99-1800, rel. Sept. 3, 1999 4
Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 F.C.C.R. 7245 (1994) 10
Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, rel. July 9, 1999, 14 F.C.C.R. 10632 (1999) ("*July 9 Public Notice*") ..... *Passim*

Liberty Productions, L.P., 16 F.C.C.R. 12061 (2001) 1, 5, 6
Two Way Radio of Carolina, Inc., 12 F.C.C.R. 958 (WTB 1997), *aff'd* 15 F.C.C.R. 12035 (1999) 10

PETITION FOR A WRIT OF CERTIORARI

Biltmore Forest Broadcasting FM, Inc. ("Biltmore"), by its attorneys, respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 321 F. 3d 155 (D.C. Cir. 2003). Its Orders denying reconsideration and rehearing *en banc* are reported at *Biltmore Forest Broadcasting FM, Inc. v. Federal Communications Commission*, No. 01-1392, Slip Op. (D.C. Cir. April 10, 2003). (Pet. App. C-1 - C-4.) The Federal Communications Commission's ("FCC's") decision granting the Liberty Productions, L.P. application and dismissing Biltmore's is reported at 16 F.C.C.R. 12061 (2001). (Pet. App. B.)

JURISDICTION

The judgment of the Court of Appeals was originally entered on March 7, 2003. Its Order denying Biltmore's petition for rehearing was entered on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATIONS INVOLVED

The FCC regulations involved are 47 C.F.R. § 1.2105(b) (1998) and 47 C.F.R. § 73.5002 (1998). The pertinent text of these regulations is set out in the appendix hereto. (Pet. App. D.) In addition, the terms of the auction were established in a *Public Notice* issued by the FCC on July 9, 1999. 14 F.C.C.R. 10632 (1999). (Pet. App. E.)

STATEMENT OF THE CASE

This case concerns the FCC's failure to abide by the eligibility rules which it had established for the auction of a broadcast radio station license. The fundamental unfairness of that failure was aggravated by the fact that, in reversing the agency's actions, the Court of Appeals below applied a highly deferential standard of review which, while appropriate in some contexts is plainly inappropriate when the agency is acting not in its traditional adjudicatory or rulemaking capacities, but rather in an auction context in which the agency itself is an interested party. The case therefore raises for the first time the issue of judicial deference to interested agency decisions.

Pursuant to authority granted by Congress in 1997, the FCC in 1998 abandoned its half-century long policy of awarding broadcast station licenses by comparative hearings. It now awards station licenses to the highest bidder through a "competitive bidding" or auction process. The FCC conducts these auctions pursuant to a hierarchy of rules that go from general rules applicable to all auctions to specific rules applicable to individual auctions. The general rules that apply to all auctions are found in 47 C.F.R. § 1.2101, *et seq.* (Pet. App. D-1), with rules specific to particular radio services found in the rules for those services. The FCC's broadcast auction rules (pertinent here) are set forth in 47 C.F.R. § 73.5001, *et seq.* (Pet. App. D-4 - D-6.) In addition to those rules, the FCC issues public notices prior to each auction which set out the specific requirements for participation in that particular auction (*e.g.*, the amount of upfront payments, bidding rules, the deadline for filing applications, permissible amendments to the applications, and the elements which must be included in applications.) The rule applicable to broadcast auctions -- duly codified in the Code of Federal Regulations -- expressly makes compliance with the requirements set forth in such pre-auction public notices mandatory:

> To participate in broadcast service or ITFS auctions, all applicants *must* timely submit short-form applications (FCC Form 175) along with all required certifications, information and exhibits pursuant to the provisions of Section 1.2105(a) *and any Commission public notices*. 47 CFR 73.5002(b).

(Emphasis added.) Accordingly, the terms establishing eligibility to participate in this auction were, by operation of the FCC's regulations, found in the *Public Notice* which the FCC issued for this auction.

In that *Public Notice*, the FCC specified the essential information, exhibits and certifications which were required in order to participate in the auction at issue here.[1] The FCC regulations[2] required applicants to supply seven different certifications which are automatically included in the electronically printed form submitted by prospective auction bidders. In addition, for this auction only, the FCC required the submission of a special certification which was designed to verify whether prospective bidders were in compliance with the FCC's policy attributing to applicants the media interests held by family members under certain circumstances. To make this requirement clear, the *Public Notice* stated in boldfaced type:

> Accordingly, **whether or not a New Entrant Bidding Credit is being sought, all applicants must provide the information set forth in this section**. The following information is required:

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[1] *Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999*, rel. July 9, 1999, 14 F.C.C.R. 10632 (1999) ("*July 9 Public Notice*"). (Pet. App. E)

[2] 47 C.F.R. § 1.2105(a)(2)(B).

. . . .

> *[B]idders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members*. See Policy Statement, *Clarification of the Commission's Policies Regarding Spousal Attribution*, 7 F.C.C. Rcd. 1920 (1992).

(Bold face and italics in original.) (*July 9 Public Notice* at Attachment B, pp. 304 (Pet. App. E-7 - E-10) 14 F.C.C.R. 10698-99.) This absolute requirement was reiterated elsewhere in the *Public Notice*: "Bidders must certify (in Exhibit A) compliance with the Commission's policies relating to media interests of immediate family members." *July 9 Public Notice* at p. 10 (14 F.C.C.R. 10641). (Pet. App. E-3). The *Public Notice* thus clearly and explicitly made the submission of this family media certification mandatory.

The *Public Notice* also unequivocally established the consequence of failure to supply this required information by the specified deadline: "**Failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction.**" (Emph. in original.) *Id.* at Attachment B, p. 2 (Pet. App. E-6 - E-7) (14 F.C.C.R. 10697). The terms governing auction eligibility were therefore firm, absolute, unambiguous and mandatory.

The auction for the Biltmore Forest construction permit at issue here was held in the fall of 1999. The original deadline for filing applications was August 20, 1999, and the "resubmission date" – the deadline for filing any corrective

amendments – was September 14, 1999.[3] Thus, according to the procedures announced by the Commission, to be eligible to participate in the auction, an applicant was required to file its application including the family media certification, no later than September 14, 1999. It is undisputed that one of the prospective auction participants, Liberty Productions, L.P. ("Liberty") failed to submit this certification by the September 14 deadline.

Since the FCC's rules precluded any pre-auction challenges to other applications, the other bidders were powerless to raise this issue prior to the commencement of the auction. Liberty therefore proceeded to participate in the auction in late September and October 1999. By the last stages of the auction, the two remaining bidders were Biltmore and Liberty. Because Biltmore had recognized that Liberty's application was fatally defective and Liberty would have to be declared ineligible under the stated rules of the auction, it stopped bidding at that point. Even the smallest incremental bid at the later stages of the auction added two or three hundred thousand dollars to the bid price.[4] By continuing to bid against Liberty, Biltmore was simply bidding up the price against a competing bidder who, under the stated auction rules, was ineligible to participate. Biltmore therefore stopped bidding, relying on the FCC's enforcement of the auction terms. Liberty was therefore declared the winner on the basis of its last high bid.

When the auction ended, the FCC's procedures permitted competing applicants to challenge the winning applicant. 47

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[3]FCC *Public Notice – Closed Broadcast Auctions*, DA-99-1800, rel. Sept. 3, 1999.

[4]Under the FCC's auction procedures, the minimum incremental bids increase in size as the gross bid amount increases. Thus, by the closing rounds of the auction, each minimal incremental bid was an additional several hundred thousand dollars.

C.F.R. 1.2108. Biltmore timely filed a petition pointing out that Liberty's application lacked the family media certification which was a prerequisite to participation in the auction and therefore it should not have been allowed to participate. The FCC thereupon issued an order stating that the above terms set forth in the *July 9 Public Notice* were merely a "general admonishment". *Liberty Productions, L.P.*, 16 F.C.C.R. 12061, 12069 (2001) (Pet. App. at B-10). Although the *Public Notice* had declared that "failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction," the FCC said that the required information could be submitted after the resubmission date – indeed, after the auction was over. The FCC also interpreted § 1.2105(b) of its rules – which explicitly rendered the failure to make certifications an irremediably fatal defect – so as to permit post-auction remediation of this particular type of certification. *Id.*

Biltmore had also challenged Liberty's qualification for a small business credit. These credits – expressed as percentage discounts off of an applicant's gross winning bid – were available at varying levels to applicants who had no or few other media interests. Liberty had claimed a 35% discount on the basis of having no other media interests. However, on the eve of the auction it had taken into its capital structure a company called Cumulus Broadcasting, Inc., which owned hundreds of broadcast stations. The FCC decided after the auction was over that Cumulus's media interests were in fact attributable to Liberty, and it therefore eliminated its discount. Previously, the FCC had consistently ruled that a change in discount level constituted a change in the "core circumstance" of an auction, and therefore could not be permitted after the auction was over. (*Liberty Productions, LP*, 16 F.C.C.R. 12061 at ¶ 39 (2001) (Pet. App. B-24).

The FCC reaped a significant windfall by reaching these post-auction determinations. Biltmore's highest bid against all other participants in the auction was $1,380,600. Had Liberty

been barred from participation in the auction (as the auction ground rules required), the FCC would have realized a total of $643,500 once Biltmore's small business credit was applied. By permitting Liberty to participate in the auction, by permitting it to correct its disqualifying defect after the auction was over, and by eliminating Liberty's bidding credit without re-conducting the auction, the FCC was able to garner a total of $2,336,000, a net benefit of almost $1.7 million.

Biltmore duly appealed the FCC's grant of Liberty's application to the District of Columbia Circuit Court of Appeals. Biltmore argued that the FCC's *post hoc* interpretation of the certification requirement as a mere "general admonishment" was plainly inconsistent with the facial terms of the requirement. Despite that plain inconsistency, the Court of Appeals reviewed the FCC's action and decided to defer to the FCC:

> We give 'controlling weight' to the Commission's interpretation of its own regulation 'unless it is plainly erroneous or inconsistent with the regulation.' *Id.* at 606. Here the Commission's interpretation does not fall below that standard. The Commission is, of course, correct in pointing out that the family certification is not among those required pursuant to § 1.2105, the omission of which incurably disqualifies the applicant as specified in § 1.2105(b)(1). It was not unreasonable for the Commission to treat the omission of a certification required only by a public notice as a "defect []' other than 'failure to ... make [a] certification' as that term is used in § 1.2105(b), and thus to provide the opportunity for correction that § 1.2105(b)(2) allows for such a defect.

In addition, while acknowledging that controlling precedents require strict adherence by government agencies to the terms of competitive bidding processes, the Court distinguished those

cases by saying that here the defect was correctable after the auction, but in the earlier cases it was not. Court of Appeals Opinion at 9-10. (Pet. App. at A-9 - A-10.) The Court accordingly upheld the grant of the license to Liberty.

FACTORS WARRANTING CERTIORARI

1. Apart from the obvious unfairness inherent in changing the rules of the auction after the auction was over, the case at bar raises a fundamental question of first impression about the standard of judicial review applicable to certain administrative agency actions. Here the FCC was acting not only as a regulator but as the seller of licenses to the highest bidder. It had every incentive to "interpret" its rules and auction procedures so as to maximize its take in the auction. An auction is nothing more than a unique and stylized method of entering into a contract. Under normal principles of construction, any ambiguity in a contract is construed against the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The Court of Appeals, however, simply accorded the FCC's interpretation the "controlling weight" that ordinary principles of judicial review prescribe for administrative agency actions. The application of that high degree of deference was indisputably outcome-determinative since the plain language of the auction rules required on its face the dismissal of Liberty's application and the barring of Liberty from participation in the auction. Under either a less deferential standard of review, or certainly under a "construction-against-the-drafter" rule of construction, the FCC would not have been allowed to contort its interpretation of the auction rules so radically. Because the FCC was itself an interested party in the transaction at issue, a reviewing court owed it little or no deference. To Biltmore's knowledge, the standard of review applicable to interested agency actions has not been addressed by this Court.

2. Former Chief Justice Warren Burger, then a judge on the D.C. Circuit, articulated a basic principle of law applicable to administrative agencies which distribute government benefits by competitive bidding:

> It is also very important that bidders who comply faithfully and scrupulously with bidding regulations should not in effect be penalized by the errors of less careful bidders who fail to follow correct procedures . . . The requirement of steadfast compliance with competitive bidding procedures comports best with the need to promote the integrity of the bidding process. Although such a stance may entail some limitation on the Secretary's discretion, it seems clear that this is an indispensable ingredient to the maintenance of the competitive bidding processes which will engender public confidence and that of persons dealing with the government.

Superior Oil Co. v. Udall, 409 F. 2d 1115 (D.C. Cir. 1969) at 1120.

This bedrock principle has been directly violated here. Without doubt, the FCC altered the terms of the auction process after the auction was over in such a way as to benefit itself (through a higher take) and Liberty (by receiving the license). A faithful and scrupulous bidder was penalized by losing everything. The FCC and the Court of Appeals decisions, by gutting the requirement that agencies adhere strictly to the terms of their own offerings, represent a serious and gravely deleterious departure from a principle "indispensable" to the integrity of competitive bidding processes undertaken by the government. Review by this Court is therefore necessary to correct these errors.

ARGUMENT

The FCC established prerequisites for participation in its auction process which, on their face, were both mandatory and unambiguous. The rule codified in the Code of Federal Regulations provided that, "[t]o participate in broadcast service or ITFS auctions, all applicants must timely submit" the certifications required by the FCC rules "and any Commission public notices." 47 C.F.R. 73.5002(b) (1998) (Emph. added.) (Pet. App. at D-5.) The pertinent *Public Notice* then stated "all applicants must provide the information set forth in this section." (July 9 *PN*, emph. added.) (14 F.C.C.R. 10641) "[B]idders . . . must certify under penalty of perjury that the bidder complies with the Commission's policies . . . ." *Ibid* at 10698-9. "Bidders must certify (in Exhibit A) compliance with the Commission's policies relating to media interests of immediate family members." *Ibid* at 10641. (Pet. App. E-3.) (Emph. added.) The repeated, often bold-faced, use of the word "must" is the very essence of the language of mandate, of obligation, of compulsion, of command. *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) cited in *MCI Telecommunications Corp. v. FCC*, 765 F. 2d 1186 (D.C. Cir. 1985). These words denote in the strongest possible terms that the submission of the family media certification was not merely advisable but was essential to eligibility to participate in the auction. Similarly, the necessary consequence of the failure to heed these commands – dismissal and non-participation – could not have been stated any more clearly: "Failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction." *Ibid* at 10697. (Pet. App. E-6 - E-7.) (Emph. added.)

In addition, the FCC had determined as part of its auction procedures that it would have an open bidding process in which competing bidders would have the fullest possible information about competing bidders. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 F.C.C.R.

7245, 7252, ¶¶ 39-42 (1994). It had considered different models in developing its basic auction plans in 1994 and had consciously decided that it was better for competing bidders to have full knowledge about each other during the auction itself rather than learning those details after the auction was over. *Id.* Indeed, the FCC had consistently adhered to that view in refusing to permit post-auction increases in bidding credits because "core circumstances" affecting the auction dynamic would have been improperly altered after the auction was over. *Two Way Radio of Carolina, Inc.*, 12 F.C.C.R. 958 (WTB 1997), *aff'd* 14 F.C.C.R. 12035 (1999). The FCC nevertheless here changed Liberty's bidding credit after the auction was over, dramatically altering a key aspect of Liberty's bidding profile which the FCC itself had earlier determined should be known to other bidders before the auction began.

The FCC's alteration of the auction rules after the close of bidding put Biltmore under a double whammy. First, given the FCC's flat dictate that bidders failing to submit the family media certification by September 14, 1999 would be dismissed and not allowed to participate, Biltmore reasonably stopped bidding in reliance on the fact that its sole remaining competitor was legally ineligible to participate. Not only was Liberty ineligible, but it asserted entitlement to a 35% "new entrant" discount, and had participated in the auction on that basis. This was the same discount Biltmore was entitled to. Had Biltmore known that it actually had a 35% bidding advantage over Liberty, the entire dynamic of the auction would have been different. Liberty had the advantage of knowing the true discount status of Biltmore and the other bidders while its own discount status during the conduct of the auction was disguised. This contravened the stated principle of open bidding that all bidders were to have access to equal

knowledge about all other bidders.[5] A critical element of the fairness of the auction procedure was abandoned when the FCC itself changed Liberty's discount status after the auction was over.

There is a fundamental antipathy in the law to changing the rules of a game after the game is over. This is why both *McKay v. Wahlenmeier*, 226 F. 2d 35 (D.C. Cir. 1955) and *Superior Oil Co. v. Udall*, 409 F. 2d 1115 (D.C. Cir. 1969) have long stood as bulwarks against the temptation of government agencies to forgive or overlook formal defects in a competitive bidding process if the result is to garner more coin for the realm. In both of these cases, the party who submitted a winning bid for a government lease was discovered after the close of the bidding not to have complied with certain formal requirements of the bidding process. In both cases, the administrative agency grasped at excuses to justify accepting the proceeds of the higher, but defective, bid. In both cases, the Court of Appeals held that scrupulous compliance by the government with the established bidding procedures was essential. Then-Judge Burger articulated the basic rule of law in terms of moral and practical principle: maintaining the integrity of government-sponsored competitive bidding processes is indispensable to maintaining public confidence by persons dealing with government. The rulings of the FCC and the Court of Appeals in this case threaten to undermine this fundamental integrity.

The Court of Appeals recognized these well-settled principles, yet side-stepped them by an artifice. The Court distinguished *McKay* and *Superior* by opining that the filing

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[5]"The multiple round [open] auction's main advantages are that it provides information to bidders regarding the value other bidders place on licenses and allows them to act on that information. This information increases the likelihood that licenses will be assigned to the bidders that value them most highly." *FCC Report to Congress on Spectrum Auctions*, 1997 Lexis 7490 (Oct. 9, 1999).

defects in those cases could not be corrected after the deadline for bids, while the filing defect here was curable after the deadline. *Court of Appeals Opinion* at 10, Pet. App. A-10. This conclusion directly contradicts the FCC's unqualified pronouncement that "failure to submit required information by the resubmission date[6] will result in dismissal of the application and inability to participate in the auction." *July 9 Public Notice* at 10697. (Emph. added.)

The FCC thus unequivocally established a deadline beyond which a defective application would necessarily be dismissed. Liberty did not correct its defect during the window afforded for this purpose. The right to participate in the auction was tied to that deadline. It was only the FCC's *post hoc* legerdemain which turned this strict mandate into a mere "general admonishment". Changing a "requirement" into an "admonishment" is precisely the kind of tampering with the auction procedures that *McKay* and *Superior Oil* found so damaging to the very integrity of the competitive bidding process. This Court held many years ago that the "[t]erms and conditions of [an auction sale by the Federal government], as set forth in the advertisement, [are] binding alike upon the United States and the bidders." *Erie Coke and Coal v. U.S.*, 266 U.S. 518, 520 (1925). If left uncorrected, this case would destroy that rule by making auction terms binding only upon some bidders at the discretion of the United States.

This brings us, then, to the central standard of review issue which calls out for intervention by this Court. The principle which ordinarily governs judicial review of administrative agency decisions is fairly well settled. An agency's interpretation of its own rule is entitled to deference "unless it is plainly erroneous or inconsistent with the regulations."

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[6]The "resubmission date" was the end of a window during which the FCC permitted applicants to correct defects after the original filing deadline.

Bowles v. Seminole Rock Co., 325 U.S. 410 (1945). Here, given the repeated injunctions by the FCC that the family media certification was required and that its absence as of a date certain was absolutely fatal to auction eligibility, a reviewing court could obviously have found that the FCC's characterization of these mandates as an "admonishment" was plainly erroneous and thus not entitled to any deference. Biltmore believes that the Court of Appeals erred in not so finding, and this Court could rather summarily rectify the error by declaring the FCC's decision so plainly erroneous as to bring it within the settled exception to the usual deference rule.

If, however, the FCC's construction of the words "must" and "required" and "will result" was not plainly erroneous, we enter a new and different realm where an agency decision is also not entitled to deference. If anything, the agency's decision here should be reviewed with a higher degree of scrutiny than would ordinarily apply. This is true for two reasons. First, the rationale for deference to an agency's interpretation of its own regulations is that agencies are experts in their own fields. *Piper v. Chris Craft Industries*, 430 U.S. 1, 41 (1977). When the Environmental Protection Agency evaluates the toxicity of carbon monoxide levels in urban air, it acts in the area of its expertise. When the FCC determines what level of interference between co-channel radio stations is acceptable, it acts with expert knowledge. On these technical matters, it makes sense for non-expert courts to accord significant deference to agencies charged with regulation of the fields in question. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980). This rationale does not hold for the FCC's interpretation of auction rules. The FCC is an expert on communications issues; the administration of auctions – basically a government contracts function – is no more within its expertise than its acquisition of office space or its hiring policies. A reviewing court is equally, if not more, competent to interpret the meaning of stated auction rules. There is, therefore, no logical basis to accord "controlling weight" to the

FCC's interpretation of an issue on which the court is actually more expert than the agency.

Second, the particular character of the matter decided by the agency – and the peculiar role played by the agency in the auction process – also argue compellingly against deference. In issuing licenses by auction, the FCC is not just a regulator; it is a seller of a commodity to the highest bidder. In *Nextwave Personal Communications, Inc. v. FCC*, 537 U.S. 293 (2003), this Court recognized that the FCC wears the hat of a regulator when it decides licensee qualifications but it wears the hat of a creditor when it has to enforce payment obligations. When it wears the latter hat, its plenary licensing powers are trumped by provisions of otherwise applicable law, such as the bankruptcy laws.

In the case at bar, the FCC acted as both the auctionor and the auctioneer. That is, it both conducted the auction and was the seller (on behalf of the United States) of the rights on the block. There may be nothing improper about such an arrangement *per se*, but it obviously calls for scrupulous compliance with auction rules since the auctioneer has a direct interest in maximizing the proceeds of the transaction.

That the FCC has such an interest cannot be denied. The FCC trumpets the revenue it generates through spectrum auctions. It proudly depicts itself taking in gigantic checks and issues press releases touting the gross auction take. One FCC Chairman compared himself to Genghis Kahn as "one of the 'most profit-generating' officials ever." *High Plains Wireless, L.P. v. FCC*, 276 F. 3d 599, 602 (2002). The FCC thus makes no bones about its eagerness to generate as much revenue as possible through its auctions. As noted in the statement of the case, had the FCC interpreted its rule so as to require the dismissal of applications which remained defective as of the resubmission date, it would have generated 1,692,500 fewer dollars for the U.S. Treasury. There were at least six well-founded grounds on which Liberty could have been disqualified in this case (including the fact that the FCC's own

ALJ had previously found Liberty unfit to be a licensee). In every single instance, the FCC visibly strained to interpret its rules and policies in such a way as to avoid disqualification of Liberty, even when its rule interpretation directly contradicted the stated purpose of the rule.

To defer to an agency in circumstances where the agency itself is a party to a commercial transaction would be like deferring to a real estate listing agent to determine whether her buyer has tendered an acceptable contract to purchase a house. The agent's personal incentive to garner a commission cannot be separated from the agent's expertise in the area of such contracts. No one would defer to such an interested party under those circumstances, and the Court should not defer to the agency here. Significantly, in the *Nextwave* case, this Court quite properly gave no deference whatsoever to the FCC's interpretation of its right to cancel the bankrupt licensee's licenses.

In adjudging whether a governmental decision maker is so biased as to preclude impartial evaluation of a case, this Court has long recognized that the desire to generate revenue for a governmental unit constitutes a sufficient pecuniary interest to disqualify an agent of that unit. In *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972), the Court held that the mayor of a town which relied on fines and penalties for its income could not serve as the decision-maker as to whether those fines should be imposed. There was no showing of actual bias by the major, but the conflicting incentives inherent in this structure made it virtually impossible for the decision-maker to rule impartially.

Here it is not clear that the FCC's twin objectives of raising the maximum amount of money in each auction while also preserving the integrity of the auction process were so diametrically and hopelessly in conflict that it should have been disqualified as an adjudicator of post-auction disputes. Such a rule may at some point prove necessary, but at a minimum the FCC's self-interested interpretations of its

auction procedures under these circumstances are certainly not entitled to the extreme deference which the Court of Appeals accorded and which would otherwise apply. To the contrary, the FCC's assessment of its own actions was structurally and inevitably skewed toward the conclusion that would maximize its take.

What emerges, then, is the need to articulate an exception to the rule requiring deference to administrative agencies which accounts for circumstances where, under ordinary commercial practice and common sense, no deference should be due. The FCC and, increasingly, other federal agencies, award the rights to scarce resources by competitive bidding. If fair, impartial and just results are to be fostered, it is important that reviewing courts, including this one, evaluate the decisions of the agencies in these cases free from the burden of deference which would otherwise apply. If the FCC's decision here were evaluated straightforwardly under the arbitrary-or-capricious, abuse-of-discretion, or contrary-to-law standards set by the Administrative Procedures Act, there is little doubt that its action could not be sustained.

CONCLUSION

Based on the foregoing, the Court should grant the requested writ and either summarily reverse the judgment of the Court of Appeals because the FCC's action was plainly erroneous, or remand the case with instructions to review the FCC's decision without according controlling weight to the FCC's interpretation of its auction rules.

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Petitioner's Appendix

A. Opinion of United States Court of Appeals for the District of Columbia Circuit

B. Memorandum Opinion and Order of the Federal Communications Commission, May25, 2001

C. Orders of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing and rehearing *en banc*, April 10, 2003

D. Portion of Federal Communications Commission Regulations, 47 C.F.R. 1.2105(a) and (b), and 47 C.F.R. 73.5001 and 5002

E. Excerpts from the Federal Communications Commission Public Notice establishing auction procedures, July 9, 1999

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 3, 2002 Decided March 7, 2003

No. 01-1392

BILTMORE FOREST BROADCASTING FM, INC.,
APPELLANT

v.

Federal Communications Commission,
Appellee

Liberty Productions L.P. and
Orion Communications, Ltd.,
Intervenors

Appeal of an Order of the
Federal Communications Commission

Donald J. Evans argued the cause for appellant. With him on the briefs was *Anne Goodwin Crump*.

Stephen C. Leckar argued the cause and filed the briefs for intervenor Orion Communications, Ltd.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, argued the cause for appellee. With him on the brief were *Jane E. Mago*, General Counsel, and *C. Grey Pash, Jr.*, Counsel.

Timothy K. Brady was on the brief for intervenor Liberty Productions L.P.

Before: GINSBURG, *Chief Judge*, and SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* GINSBURG.

GINSBURG, *Chief Judge*: Biltmore Forest Broadcasting FM, Inc. appeals an order of the Federal Communications Commission awarding an FM radio station license to intervenor Liberty Productions L.P., which was the high bidder in the auction of that license. Biltmore and intervenor Orion Communications, Ltd., each of which also bid, claim that Liberty should have been disqualified because errors in Liberty's license application were not correctable after the auction and in its application Liberty had misrepresented facts about its access to a transmitter site. Because neither contention has merit, we affirm the order of the Commission.

I. Background

In 1987 thirteen radio companies, including Biltmore, Liberty, and Orion, filed applications with the Commission for an FM station license in Biltmore Forest, North Carolina. At that time the Commission's policy was to hold comparative hearings in order to determine the qualifications of the applicants and to decide which of the qualified applicants would best serve the public interest. An Administrative Law Judge held such a hearing and determined that neither Biltmore nor Liberty had a "reasonable assurance" that a transmitter tower site was available to it, as the Commission then required. The ALJ determined also that Liberty had intentionally misrepresented facts about the availability of a site. *Nat'l Communications Indus.*, 5 F.C.C. Rcd. 2862 (ALJ 1990).

The following evidence was before the ALJ when he made his finding concerning Liberty's misrepresentation. Valerie Klemmer, the general partner behind Liberty, certified that Liberty had a reasonable assurance a certain site was available. Klemmer, a neophyte in the broadcasting arena, testified before the ALJ that her certification was based upon a conversation she and a friend named Tim Warner had had on August 25, 1987 with Vickey Utter, the owner of a parcel of land near Biltmore Forest. Warner had had prior dealings with Ms. Utter in his capacity as an executive at WCQS, a public radio station in Asheville. He also had experience certifying that an applicant had a reasonable assurance a site would be available to it. Klemmer believed she had reached an agreement with Utter on August 25. She made no plans to secure any other site for the tower in the event the deal with Utter fell through.

Utter consistently denied having made any deal with Klemmer. In other respects, however, Utter's testimony was most inconsistent. In a February, 1989 affidavit she said she had no knowledge of Klemmer or Liberty and had never given Klemmer or any other representative of Liberty any assurance that her property would be available for a transmitter. Indeed, she denied having spoken to anyone representing Liberty. In a signed statement dated March 13, 1989, however, Utter said that Warner had reminded her that he and Klemmer had visited her and that they had discussed leasing a portion of her land, "but since [Klemmer] never contacted me again I assumed she found some place more suitable for her project." Later in March Utter reiterated her position that she had never given Klemmer any assurance the land would be available, explaining that "[i]f we had discussed this or I had given her this assurance I certainly would have remembered and I would have been looking for her to make a commitment of some sort."

At a deposition in April, 1989 Utter again recalled speaking with Klemmer and Warner, but she could not remember the details of the conversation. She did recall telling Klemmer and Warner about a lease she and Brian Lee, a representative of Orion, had executed on August 21, 1987 for the use of

a portion of her land as a transmitter site. She had signed the February affidavit at the request of Lee, she explained. On March 11, Utter stated, Klemmer and Warner had visited her at her home and refreshed her memory of their earlier meeting. They had wanted her to sign a statement that she would be willing to lease the site to Liberty; Utter had refused but instead wrote and signed the statement of March 13 in which she acknowledged having discussed the matter with Klemmer and Warner in August. Utter stated in her deposition that although at the time she signed the March 13 statement she did not recall ever having discussed leasing her land to Klemmer, she included the assertion that she had done so "because that's what [Warner] kept telling me the night he and [Klemmer] were at the house."

Klemmer testified to a different version of events. She said that at the August meeting she and Warner told Utter of Liberty's interest in leasing a portion of Utter's property in the event Liberty received the license. They discussed a price of $4,000 per year. There was no mention of Utter having entered into a prior lease agreement with Lee or Orion. Klemmer believed her oral agreement with Utter gave her a reasonable assurance of the site being available for two reasons: Warner told her both that Utter had honored previous oral agreements he had made with her on behalf of WCQS, and that he understood from WCQS's attorney that an oral agreement was sufficient for an applicant to certify having a reasonable assurance. In his testimony Warner corroborated Klemmer's account of their meeting with Utter and the two statements she attributed to him.

Upon this record the ALJ made findings adverse to Liberty. In particular, the ALJ concluded that Klemmer had "absolutely no basis" for representing that she had obtained a reasonable assurance the Utter site was available to Liberty. Further,

> she knew she had no basis for [doing so]. To argue that her feeble, half-hearted effort to obtain some of Vicki Utter's land ... constitutes "reasonable assurance" strains credulity. No, Valerie Klemmer has blatantly

> dissembled in a manner that doesn't befit a prospective broadcast permittee.

5 F.C.C. Rcd. at 2879 ¶ 8. The ALJ did not address Warner's testimony at all.

Various parties appealed the ALJ's decision to the Review Board, which affirmed that Liberty was disqualified on the site issue and therefore did not reach the misrepresentation issue. *Nat'l Communications Indus.*, 6 F.C.C. Rcd. 1978, ¶¶ 8-12 (Rev. Bd. 1991). The Board's decision survived review by the full Commission as well as two petitions for reconsideration. *Nat'l Communications Indus.*, 7 F.C.C. Rcd. 1703, ¶ 2 (1992); *Liberty Prods., L.P.*, 7 F.C.C. Rcd. 7581, ¶ 36 (1992); *Liberty Prods., L.P.*, 8 F.C.C. Rcd. 4264, ¶ 4 (1993). When the appeal reached this court, however, we summarily reversed and remanded the case to the Commission for reconsideration, *Biltmore Forest Broad. FM, Inc. v. FCC*, 1994 WL 116196 (Mar. 15, 1994), in light of our intervening decision in *Bechtel v. FCC*, 10 F.3d 875 (1993); there we had held the Commission's "integration policy," which favored an applicant who intended personally to manage and operate the proposed station over one who intended to entrust its operation to employees, was arbitrary and capricious. As a consequence, the ALJ's disqualification of Liberty and Biltmore for want of an available site was never reviewed by the court, and the ALJ's disqualification of Liberty for misrepresentation was never reviewed at any level – not by the Review Board or the Commission or the court.

Before the Commission reconsidered on remand which of the applicants would best serve the public interest, however, the Congress authorized the Commission to award licenses for FM stations upon the basis of competitive bidding, Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258-65, and the Commission adopted a method of doing so using auctions. *Implementation of Section 309(j) of the Communications Act*, 13 F.C.C. Rcd. 15920 (1998), *on recon. at* 14 F.C.C. Rcd. 8724 (1999), *aff'd sub nom. Orion Communications, Ltd. v. FCC*, 213 F.3d 761 (D.C. Cir. 2000).

On July 9, 1999 the Commission announced the requirements and procedures for bidding in Auction No. 25, which would include the FM license at Biltmore Forest. Public Notice, 14 F.C.C. Rcd. 10632. Among other things, the July 9 Notice announced the starting date of the auction (September 28, 1999), *id.* at 10633, the deadline for the submission of short form applications (August 20, 1999), *id.*, and the various showings and certifications required of each applicant. *Id.* at 10641. Liberty timely filed its short form application but failed to certify its "compliance with the Commission's policies relating to media interests of immediate family members." *Id.*

On September 10, 1999 Liberty arranged to borrow a large sum of money from Cumulus Broadcasting, a nationwide media company. It reported the loan agreement to the Commission on September 27. *Liberty Prods., L.P.*, 16 F.C.C. Rcd. 12061 ¶ 23 (2001). The auction began on September 28 and lasted until October 8. Liberty was the high bidder, followed by Biltmore and Orion. *Id.* ¶ 5. On November 10 Liberty amended its application to include details of the Cumulus loan agreement. *Id.* ¶ ¶ 6, 23. On November 24 it provided the "family certification" to the Commission. *Id.* ¶ 17.

Because Liberty was the high bidder, the Commission on November 23 recommenced its proceeding "to consider the ALJ's previously unreviewed findings on the false certification issue." *Id.* ¶ 4. In the order now under review, the Commission reviewed the question of Liberty's misrepresentation and addressed Biltmore's and Orion's new charges that Liberty had engaged in irregularities in the auction process.

The Commission held that Liberty's failure to submit the family certification with its short form application did not require dismissal of its application or invalidation of its selection as the permittee on the basis of the auction, *id.* ¶ ¶ 14-19, and that the loan agreement between Liberty and Cumulus did not improperly bring a new party into the auction. *Id.* ¶ ¶ 26-28. The Commission also held that Liberty, by entering into the loan agreement with Cumulus, was no longer

eligible for the "new entrant bidding credit," *id.* ¶¶ 32-37, pursuant to which a company without major media interests was not required to pay the full amount of its bid. And the Commission rejected the suggestion that Liberty's becoming ineligible for the bidding credit required it either to dismiss Liberty's application or to set aside the results of the auction. *Id.* ¶¶ 38-39. Finally, the Commission reversed the ALJ's finding that Liberty had misrepresented the availability of the proposed transmitter site in its 1987 application. *Id.* ¶¶ 49-72.

Having found no reason to disqualify Liberty, the high bidder in the auction, the Commission awarded it the license. Biltmore appealed, Orion intervened in support of Biltmore, and Liberty intervened in support of the Commission.

II. Analysis

Biltmore's and Orion's objections to the Commission's award of the license to Liberty are of two types: claims that Liberty's failure to adhere to all the rules of the auction disqualifies it from holding the license, and claims that Liberty engaged in misrepresentation before the Commission and is therefore unfit to be a licensee.

A. Auction Violations

Biltmore claims that both Liberty's failure timely to file the family certification and its entering into the loan agreement with Cumulus disqualify it from the auction.*

1. Family certification

Biltmore argues that both the July 9 Notice and the Commission's regulations require that Liberty's application

* Intervenor Orion also argues the Commission arbitrarily and capriciously refused to determine whether the Cumulus loan amounted to a change in ownership that would disqualify Liberty under 47 U.S.C. § 309(*l*)(2). Because no party raises this argument, it is not properly before the court, and we shall not consider it. *See Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) ("Except in extraordinary cases . . . intervenors may only join issue on a matter that has been brought before the court by another party").

be dismissed for failure to file the required family certification.* The July 9 Notice stated that "Bidders must certify ... compliance with the Commission's policies relating to media interests of immediate family members," 14 F.C.C. Rcd. at 10641, and 47 C.F.R. § 73.5002(b) requires that the short form application contain "all required certifications, information and exhibits, pursuant to the provisions of 47 C.F.R. 1.2105(a) and any Commission public notices."

Regarding the effect of an applicant's failure to submit required information, 47 C.F.R. § 1.2105(b) provides two different sanctions. First, § 1.2105(b)(1) states:

> Any short-form application ... that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

Other omissions are not subject to such Draconian treatment, however. Section 1.2105(b)(2) provides: "The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application." The Commission's grace is not unlimited; if the applicants "fail to correct defects in their applications in a timely manner as specified by public notice," then they "will have their applications dismissed without opportunity for resubmission." § 1.2105(b)(3). As for the July 9 Notice, it states only that "[f]ailure to submit required information by the resubmission date will result in dismissal of the application and

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* Liberty responds with the claim that it was not subject to this filing requirement because "there could be no certification of compliance as to interests which were nonexistent." We shall not consider this attempt by intervenor Liberty obliquely to appeal the Commission's decision that Liberty was required to file the certification. To contest this aspect of the Commission's decision, Liberty should have filed a conditional cross-appeal. *See generally* 15A Charles A. Wright et al., Federal Practice & Procedure § 3902, at 78-79 (1992) (collecting cases).

inability to participate in the auction. *See* 47 C.F.R. § 1.2105(b)." 14 F.C.C. Rcd. at 10697.

The Commission argues that neither 47 C.F.R. § 1.2105(b) nor the Notice requires Liberty's disqualification: The regulation applies by its terms only to "the certifications required pursuant to this section." Because the family certification was required by the July 9 Notice rather than by § 1.2105, according to the Commission, the disqualification provided in § 1.2105(b)(1) does not apply to the omission of that certification. Rather, the applicable provisions are the more forgiving §§ 1.2105(b)(2)-(3), which afford an applicant the opportunity to make corrections before the Commission dismisses its application with no opportunity for resubmission. The parenthetical exception in subsection (b)(2) taking "failure to ... make certifications" out of the class of "defects" curable under that subsection does not apply to the family certification, the Commission's argument suggests, because the "certifications" in question are only those implicated in subsection (b)(1), namely "the certifications required pursuant to" § 1.2105.

As for the July 9 Notice, the Commission contends it simply is not clear enough to require Liberty's automatic disqualification for failure to submit the family certification: Although the Notice stated that a bidder that failed to submit "required information" before the auction would be "[unable] to participate in the auction," it did not state that such an omission was incurable if it came to light after the auction was held. Because the Notice did not directly speak to Liberty's situation, the Commission goes on, disqualifying Liberty based upon the Notice would deprive it of fair warning that its application might be disqualified without an opportunity to correct it, contrary to the rule we endorsed in *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 607 (2002) ("That the rule did not afford adequate notice reflexive bidding was unlawful is itself sufficient justification for the Commission not to penalize [the bidder]").

We give "controlling weight" to the Commission's interpretation of its own regulation "unless it is plainly erroneous or

inconsistent with the regulation." *Id.* at 606. Here the Commission's interpretation does not fall below that standard. The Commission is, of course, correct in pointing out that the family certification is not among those required pursuant to § 1.2105, the omission of which incurably disqualifies the applicant as specified in § 1.2105(b)(1). It was not unreasonable for the Commission to treat the omission of a certification required only by a public notice as a "defect[ ]" other than "failure to . . . make [a] certification[ ]" as that term is used in § 1.2105(b), and thus to provide the opportunity for correction that § 1.2105(b)(2) allows for such a defect. We also agree with the Commission that it should not – more properly, that it need not – disqualify Liberty after the auction on the basis of an omission that, according to the Notice, would disqualify an applicant if discovered prior to the auction.

Biltmore's arguments to the contrary notwithstanding, neither *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), nor *Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), requires a different conclusion. In each case we reversed the Secretary of the Interior's award of a lease based upon an incurably defective application. Indeed, in those cases the Secretary had awarded the lease after finding specifically that the defect was incurable. *See McKay*, 226 F.2d at 40 ("The Secretary found that his application was defective and that it was filed in an inherently unfair situation which would have caused it to be rejected had the real situation been disclosed before the drawing"); *Superior Oil*, 409 F.2d at 1119 (quoting the Secretary, "the deficiency in Union's bid cannot be waived, nor can it be supplied after the time for receipt of the bids"). In this case the Commission made the opposite finding: Because the family certification was not required by § 1.2105, the omission could be cured. Hence, *McKay* and *Superior Oil* are not controlling.

2. Loss of bidding credit

Section 1.2105(b)(2) provides that "[m]ajor amendments cannot be made to a short-form application after the initial filing deadline," and states that such amendments include

"changes in an applicant's size which would affect eligibility for designated entity provisions." Similarly, the July 9 Notice, citing this provision, stated that "[a]s described more fully in the Commission's Rules, after the ... short-form filing deadline.... [a]pplicants will not be permitted to make major modifications to their applications (*e.g.*, ... change bidding credits)." 14 F.C.C. Rcd. at 10644.

Biltmore claims that because Liberty's amendment (after the filing deadline) of its short form application to reflect the loan from Cumulus affected its eligibility for a bidding credit, the change was a "major amendment" and therefore untimely. Further, it argues, allowing the change in bidding credits would affect the integrity of the auction by altering one of its "core circumstances."

The Commission responds that the new entrant bidding credit does not depend upon an applicant's "size" but upon its other attributable media interests; the "size" criterion applies only to the "small business bidding credit," which is based upon the bidder's revenues. *See* 47 C.F.R. §§ 90.810, 90.814. The Commission points out that the definition of a "major amendment" in the regulation, which predates the introduction of the new entrant bidding credit, refers only to certain changes in ownership, certain changes in size, and changes in the intended service areas. 16 F.C.C. Rcd. 12061 ¶ 25. Because the loan from Cumulus did not effect a change in Liberty's ownership or size, the Commission argues, its resulting loss of eligibility for a new entrant bidding credit is not a "major amendment" and therefore does not disqualify it from the auction. As for the July 9 Notice, the Commission argues that it purported merely to restate the regulation. To the argument that the integrity of the auction was undermined by Liberty's loss of the bidding credit, the Commission responds that whereas a post-auction increase in bidding credits may change the "core circumstances" of an auction, a post-auction reduction in such credits does not.*

* Liberty adopts the Commission's position but also claims that, because the July 9 Notice specified that attributable interests were to be "determined as of the short form ... filing deadline – August

The Commission's interpretation of § 1.2105 is neither plainly erroneous nor inconsistent with the regulation. The provision describing major amendments certainly addresses the small business bidding credit, and the Commission reasonably so interpreted it. Whether the provision also applies to other bidding credits, such as that for new entrants, is not clear on the face of the regulation. Although Biltmore argues that for purposes of the new entrant credit we should construe "changes in size" to include the number of media interests attributable to an applicant, we do not think that is the only permissible construction of the regulation. On the contrary, we think the Commission's narrower interpretation of the regulation is quite reasonable. Nor does the July 9 Notice, which specifically referred to § 1.2105 as authority for the proposition that "changes in bidding credits" are major amendments, require (or perhaps even allow) the Commission to treat as a major amendment a change that § 1.2105 does not define as such.

Biltmore argues that the Commission's prior determinations limit its discretion to find that a change in the new entrant credit is not a major amendment. In *Two Way Radio of Carolina, Inc.*, 14 F.C.C. Rcd. 12035, ¶ 8 (1999), the Commission held that

> modification of an applicant's small business status does not constitute a minor change under our competitive bidding rules, and that providing Two Way Radio with more favorable financial benefits after the close of the auction, based on information not available to other bidders during the auction, would adversely affect the integrity of the auction process.

The rationale for the holding was that "other bidders placed bids based upon their understanding of the specific bidding credit and the type of installment payment plan to which Two

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20, 1999," 14 F.C.C. Rcd. at 10639, whereas the loan from Cumulus was effective after that date, Liberty should not have been denied the bidding credit. Because no party appealed that determination, however, Liberty's claim is not properly before the court. *See* p. 8, above, at n.*.

Way Radio, as well as other bidders, were entitled." *Id.* ¶ 9. *See also Clearcall, Inc.*, 12 F.C.C. Rcd. 965 (WTB 1997). The Commission's rationale seems at first blush to apply with equal force to the new entrant credit.

The Commission, however, distinguishes this precedent by pointing out that the proposed amendment in *Two Way Radio* would have increased the applicant's bidding credit, while this case involves an amendment that decreases the applicant's bidding credit. In its Order the Commission stated that it "fail[ed] to see how [Liberty's] mistake would have deprived the other auction participants of information as to Liberty's valuation of the frequency, or would have otherwise influenced their bidding strategies." 16 F.C.C. Rcd. 12061, ¶ 39.

Nor do we see any such problem. Indeed, it is not clear to us – and the Commission does not explain – why even a post hoc increase in bidding credits would raise a question about the integrity of an auction. But the Commission is under no obligation in this case to justify its holding in *Two Way Radio*, whereas Biltmore has the burden of persuading us that Liberty's post-auction loss of the bidding credit was, as the Commission said of the change in *Two Way Radio*, prejudicial to other bidders. To the extent Biltmore claims it was prejudiced because, if it had "known that it was bidding with cheaper dollars than Liberty, it might very well have been willing to press the bidding higher," it makes no sense: Liberty's cost could not rationally affect Biltmore's willingness to pay. Accepting for the sake of the argument Biltmore's suggestion that Liberty might "not have bid as high as it did if it had known that it was paying full dollars," we see only that Liberty's error may have been costly to it, not that it could "adversely affect the integrity of the auction process," *Two Way Radio*, 14 F.C.C. Rcd. ¶ 8.

B. Misrepresentation

Biltmore next claims the Commission was not free to reject the ALJ's finding that Liberty misrepresented facts about the availability of a transmitter site. The appellant maintains that because the Commission did not disturb that finding on

its initial review, it became the law of the case. Biltmore also claims the ALJ's finding is entitled to special deference, and that in any event the Commission's contrary finding that there was no misrepresentation is not supported by substantial evidence. None of these claims has any merit whatsoever.

1. Law of the case

Biltmore argues first that the Review Board's decision, 6 F.C.C. Rcd. 1978 (1991), acted to affirm the ALJ's finding of misrepresentation. Here it points to the statements in the Commission's first decision on reconsideration, 7 F.C.C. Rcd. 7581 (1992), that Liberty's application for review of the misrepresentation finding had been denied "without specifying reasons" and its petition for reconsideration raised only matters that had been "already considered and rejected without comment." *Id.* ¶ 36. Biltmore claims the ALJ's finding therefore became the law of the case and the Commission could not later reverse it.

The Commission, joined by Liberty, responds that this argument is not properly before the court because Biltmore did not raise it before the Commission. Not so. Although Biltmore argued before the Commission first that it should review and adopt the ALJ's findings, it did argue in the alternative that the ALJ's findings were the law of the case. *See* BFB Opp. to Supp. Brief at 2, 4. We therefore go to the merits of Biltmore's law of the case argument.

The Review Board expressly found it unnecessary to reach the misrepresentation issue once it had held Liberty was disqualified "on the site issue." 6 F.C.C. Rcd. 1978, ¶ 12. For the same reason the Commission, on appeal, had no reason to consider and to reject Liberty's claim that the ALJ had erred in finding a misrepresentation in its application. Biltmore is simply mistaken, therefore, in suggesting that the Commission adopted the ALJ's misrepresentation finding. For the record, we note also that the law of the case doctrine is of uncertain force in the context of administrative litigation. *See Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 518 (9th Cir. 1989) ("[I]t is doubtful that federal courts have the authority

to extend the law of the case doctrine to proceedings involving non-judicial decisionmakers").

2. Deference to the ALJ's credibility findings

Next Biltmore, now joined by Orion, argues that the ALJ's finding that Klemmer "strain[ed] credulity" and "blatantly dissembled" is a credibility determination to which we must give special deference on review. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) ("The significance of [the ALJ's] report, of course, depends largely on the importance of credibility in the particular case"). They maintain that the ALJ must have based his finding upon Klemmer's demeanor, which of course defies appellate inspection. *See United States v. Zeigler*, 994 F.2d 845, 849 (D.C. Cir. 1993). The Commission and Liberty, on the other hand, argue the ALJ's finding reflects not his assessment of Klemmer's and Warner's credibility but rather his ultimate judgment on the issue whether Klemmer had misrepresented the availability of a transmitter site. Similarly, they claim it was the proposition that Klemmer had a reasonable assurance the Utter site was available to Liberty, rather than Klemmer's testimony, that "strain[ed] credulity."

As the Commission emphasizes, the important issue in the misrepresentation inquiry was not whether Klemmer had a reasonable assurance, but whether she was lying when she said she had a reasonable assurance. Indeed, the ALJ's entire discussion of the misrepresentation issue focuses upon the inadequacy of Klemmer's efforts to secure a site, as compared to the efforts Utter expected her to make (and the efforts Lee did make). 5 F.C.C. Rcd. at 2866-67 ¶ ¶ 36-51, 2879 ¶ 8. The ALJ seems to have reasoned that any reasonable person would know the effort Klemmer made was inadequate, so Klemmer must have been lying when she said she thought it was adequate. Nowhere does the ALJ directly attack Klemmer's testimony that she believed at the time that her efforts were adequate, let alone attribute such disbelief to his interpretation of her demeanor. Instead, his appeal is to other evidence in the record, and we owe no special deference to the ALJ's interpretation of the record.

3. Substantial evidence for the Commission's finding of no misrepresentation

Finally, Biltmore and Orion argue that the Commission's finding Liberty did not misrepresent the facts in its application is not supported by substantial evidence in the record. *See* 5 U.S.C. § 706(2)(E); *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 194 (D.C. Cir. 2000). Commission precedent establishes that misrepresentation can be either intentional or grounded in "an indifference and wanton disregard for the licensee's obligations to the Commission that is equivalent to an affirmative and deliberate intent." *Liberty Cable Co., Inc.*, 15 F.C.C. Rcd. 25050, ¶ 50 (2000) (quoting *RKO General, Inc. v. FCC*, 670 F.2d 215, 225 (D.C. Cir. 1981)).

Under either approach there is substantial evidence to support the Commission's finding that Klemmer did not misrepresent Liberty's situation. Klemmer's testimony was that Warner, who she had reason to believe was knowledgeable about such things, told her that an oral agreement with Utter would suffice to constitute a reasonable assurance of having a transmitter site. She further testified that she believed she had reached such an oral agreement, and she described a meeting that the Commission could reasonably accept as justification for that belief. Although Utter gave a different account of the meeting, her testimony was internally inconsistent and the Commission need not have credited it. In sharp contrast, Klemmer's testimony was consistent and corroborated by that of Warner. Although Warner was a friend of Klemmer's, that is not enough, contrary to Orion's suggestion, to require that the Commission discount his testimony. The testimony of Klemmer and Warner is surely sufficient to support the Commission's finding that Klemmer believed she had a reasonable assurance that Utter's site was available to Liberty.

III. Conclusion

For the foregoing reasons the Commission's order awarding the license to Liberty is

Affirmed.

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 88-577
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
For A Construction Permit For A New FM Broadcast Station on Channel 243A At Biltmore Forest, North Carolina	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 2001; Released: May 25,2001

By the Commission: Commissioner Tristani dissenting and issuing a statement.

1. In this order, we reverse the Administrative Law Judge's decision, National Communications Industries, 5 FCC Rcd 2862, 2879 * 8 (ALJ 1990), insofar as it disqualified Liberty Productions, Limited Partnership (Liberty) on the site certification issue, and we accept the Amendment that Liberty filed on November 10, 1999. We also deny the motions to enlarge issues filed on November 12, 1999 by Orion Communications Limited (Orion) and Biltmore Forest Broadcasting FM, Inc. (BFBFM) and on November 24, and December 13, 1999 by Willsyr Communications, Limited Partnership (Willsyr). We also deny the Joint Request for Approval of Settlement filed November 14, 2000 by BFBFM and Liberty. For the reasons set forth below, we find that Liberty is ineligible for the 35 percent New Entrant Bidding Credit that it received in the closed broadcast auction that commenced on September. 28, 1999. Subject to the payment of the full gross amount of its winning bid in the Closed Broadcast Auction, and compliance with all applicable payment procedures, we therefore grant Liberty's pending long form application, as amended, and dismiss the mutually exclusive applications of the other remaining applicants.

I. BACKGROUND.

2. The above-captioned applicants seek a construction permit for a new FM station on channel 243A at Biltmore Forest, North Carolina. After an evidentiary hearing before an Administrative Law Judge, the ALJ issued an Initial Decision disqualifying Liberty on site availability and site certification issues. 1 The Commission affirmed Liberty's disqualification on the site availability issue without considering the ALJ's findings on the site certification issue. The Commission also affirmed the ALJ's determination that Orion was the comparative winner based on its superior integration proposal. 2

3. Timely notices of appeal of the Commission's decision in this case were pending before the United States Court of Appeals

for the District of Columbia when that court issued its decision in Bechtel v. FCC, 3 invalidating the primary comparative criterion on which the Commission had relied in granting Orion's application. Thereafter, the Commission stayed all comparative broadcast proceedings 4 and ultimately determined to resolve frozen hearing proceedings by competitive bidding procedures. 5 The court, on March 15, 1994, remanded this case to the Commission for further consideration in light of Bechtel and, in a separate action, subsequently ordered the reinstatement of Orion as the interim operator on Channel 243A pending resolution of the above-captioned proceeding to select the permanent licensee. 6

4. Pursuant to the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications, the above captioned applicants were identified as the only qualified bidders eligible to compete for a license for Channel 243A in Biltmore Forest. 7 The order referring these applications to the Mass Media Bureau for processing in accordance with our auction procedures also indicated that, if Liberty were the high bidder, the hearing proceeding would resume to consider the ALJ's previously unreviewed findings on the false certification issue. 8

5. Liberty filed its short-form application on August 19, 1999. The auction commenced on September 28 and closed on October 8, 1999. Liberty was the high bidder, followed by BFBFM, Orion, and Willsyr, 9 and the adjudicatory proceeding was resumed to consider the false certification issue involving Liberty's transmitter site and Liberty was afforded an opportunity to file a supplemental brief on that issue. 10

6. In accordance with Section 73.5005 of the Commission's Rules, 47 C.F.R. 73.5005, Liberty submitted an amendment to its long-form application on November 10, 1999. Two of the unsuccessful bidders, Orion and Willsyr, filed oppositions to Liberty's November 10, 1999 amendment of its long-form

application. 11 Following the resumption of the adjudicatory proceeding on November 23, 1999, Orion, Willsyr and BFBFM also filed motions to enlarge the issues against Liberty. 12

7. Pursuant to Section 0.111(b) of the rules, 47 C.F.R. 0.111 (b), the Enforcement Bureau serves as the Commission's trial staff in this adjudicatory proceeding. The Assistant General Counsel, Administrative Law Division, has afforded the Enforcement Bureau an opportunity to file comments on the above-described pleadings. 13 The Bureau recommends that the issues be decided in Liberty's favor, and that the various motions to enlarge issues should be denied. However, the Bureau believes Liberty is ineligible for the 35 percent New Entrant Bidding Credit. Thus, it recommends that Liberty should be required to pay the full amount of its winning bid at the time of final payment. Separate replies have been filed by Liberty, Orion, BFBFM, and Willsyr. 14

8. On November 14, 2000, BFBFM and Liberty filed a Joint Request for Approval of Settlement. 15 Pursuant to the attached agreement Liberty would dismiss its application, BFBFM would reimburse Liberty for its legitimate and prudent expenses, 16 and BFBFM and Liberty's general partner would enter into a consulting agreement. The agreement, however, is contingent on BFBFM being designated the winning bidder based on its bid of $643,500 in Round 12 and on Liberty receiving a full refund of its down payment and not incurring any penalty under 47 C.F.R. 1.2109(c) for not paying its high bid of $2,336,000. The settlement agreement is opposed by the Enforcement Bureau and by unsuccessful bidders Orion and Willsyr, who ranked third and fourth, respectively, in the auction. Consolidated replies have been filed by Liberty and by BFBFM, and Liberty has filed a separate reply to the Enforcement Bureau's opposition.

II. DISCUSSION

9. For the reasons set forth below we find no basis to approve a settlement agreement that is contingent on Liberty and BFBFM being relieved of obligations incurred during the September 1999 auction. We also find no basis to dismiss Liberty's short-form application. We conclude further that its November 10, 1999 amendment specifying a new transmitter site may be accepted without regard to the Commission's earlier adverse resolution of the site availability issue, and that the amendment does not reflect a change of control of the applicant. As to Liberty's basic qualifications, we find no basis to specify either false certification or misrepresentation/lack of candor issues against Liberty and we reverse the ALJ's determinations on the site certification issue relating to Liberty's original proposal. Finally, we conclude that, because of the numerous attributable media interests of Cumulus Broadcasting, Liberty is not eligible for the 35 percent new entrant bidding credit.

1. Settlement Agreement

10. We reject the proposed settlement agreement insofar as it is expressly conditioned on BFBFM being designated the winning bidder for less than its final net bid of $1,518,400 17 and the dismissal of Liberty's application without a penalty and for a full refund of its down payment. The parties assert that Liberty participated in the auction in good faith and remains willing to honor the bids it made in the auction, but that, in the interest of expediting the resolution of this proceeding, is now willing to dismiss its application and relinquish its claim to the construction permit. BFBYM, alleging that Liberty's short-form application was defective, urges that it should receive the license for its Round 12 bid of $643,500 (the final net bid placed against an applicant other than Liberty), and that Liberty should not be liable for any default penalty. Liberty, on the other hand, maintains that its short-form application was not defective, that it has not defaulted,

and that there is, in light of the proposed settlement, thus no basis for the Commission to impose a penalty or retain its down payment. The Enforcement Bureau asserts that the possible benefits of the settlement agreement are too insubstantial to offset the direct and tangible loss to the treasury as well as the likely damage to the auction process and the likelihood of additional litigation concerning BFBFM's basic qualifications. It notes that Liberty's offer to relinquish its bid for the permit comes after the filing of numerous pleadings challenging Liberty's eligibility for a claimed bidding credit, its basic qualifications, and the acceptability of its short-form application. Waiving the default penalty and offering BFBFM the license for less than its final bid in these circumstances, the Bureau predicts, would have broad implications in future auction cases. Willsyr and Orion urge that, as a matter of fairness, the withdrawal of Liberty's application would require a second auction. Orion also objects to various aspects of the settlement agreement.

11. Section 1.2109(c) provides that, if a winning bidder defaults, "the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids." 18 It provides further that "[a] winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment will be deemed to have defaulted and will be liable for the payment set forth in Section 1.2104(g)(2)." The settling parties urge that the voluntary withdrawal of Liberty's application pursuant to a post-auction settlement agreement does not constitute a default under Section 1.2109(c), and that no other provision of the Commission's rules precludes BFBFM from being designated the winning bidder based on its bid in Round 12 or requires that Liberty be assessed a penalty. But Section 1.2109(b) provides that "[I]f a winning bidder withdraws its bid after the Commission has declared competitive bidding closed . . . the bidder will be deemed to have defaulted, its application will be

dismissed, and it will be liable for the default payment specified in Section 1.2104(g)(2)." Furthermore, default, as defined by Section 1.2104(g) of the rules, includes "bidders . . . who default on payments due after an auction closes or is disqualified." Notwithstanding Liberty's asserted good faith during the auction and its continued willingness to make payments due after the auction, Liberty, by virtue of the settlement, will "withdraw[] a bid after the Commission has declared the competitive bidding closed" and it will not remit "payments due after an auction closes." 66 Approval of an agreement expressly conditioned on BFBFM being offered the license for less than its final bid and Liberty not incurring a default penalty therefore would require a waiver of Sections 1.2104 and 1.2109.

12. The settling parties cite the unusual circumstances of this case, as well as the public interest benefit of expediting the resolution of a long-pending case, as justifying a waiver of the rules to allow BFBFM to return to its bid in Round 12 and to allow Liberty to withdraw its application with a full refund of its down payment and without incurring any penalty under section 1.2104(g). It is unclear, however, that the settlement would expedite resolution of this case, given that there are unresolved questions as to BFBFM's basic qualifications and that the other applicants would have an opportunity to raise additional issues against BFBFM following its designation as the winning bidder. 19 That this case was litigated through the Commission and the courts before we decided to use auctions to resolve these cases provides no basis to distinguish this case from other auction proceedings, and is therefore not a basis to waive these auction procedures. Indeed, the Commission specifically advised applicants in the hearing cases to "carefully consider the impact of auction rules prescribing penalties in the event of default or disqualification" in deciding whether to participate in the auction. 14 FCC Rcd at * 16. None of BFBFM's other equitable arguments persuade us to waive section 1.2109(c) and offer the license to BFBFM's for any amount less than its final bid in Round 27.

13. It would also not serve the public interest to approve a settlement agreement expressly conditioned on the license being offered for less than final net bids placed during the auction. The efficacy of auction procedures designed to discourage insincere bids would be seriously impaired if bidders could, without penalty, expunge their bids after the close of the auction. To permit such post-auction abandonment of final bids here would clearly be unfair to Orion and Willsyr, who might have pursued quite different bidding strategies, had they been aware that bids could be withdrawn after the auction. Similar considerations would militate against waiving any default penalty owed by Liberty under Section 1.2104(g)(2). Therefore, because we are not prepared to offer the license to BFBFM for less than its final net bid of $1,380,600 in Round 27 or to permit Liberty to dismiss its application without penalty, we deny the request to approve the agreement without considering whether any of its other provisions would provide additional reasons for its rejection.

2. Short-Form Application

14. There is no merit to BFBFM's contention that because Liberty's
short-form application did not contain all requested information, it should now be summarily dismissed pursuant to Section 1.2105(b) of the Rules, 47 C.F.R. 1.2105(b). The Public Notice, released July 9, 1999 by the Bureaus, announcing the filing procedures for this auction contains the following instruction that, as BFBFM notes, is addressed to "All applicants." 20 "[B]idders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members." (Emphasis in original.)

15. This certification was not included in the short-form application that Liberty filed on August 19, 1999. This omission, however, is not a basis to now dismiss the application or to set

aside the results of the auction without opportunity for resubmission after the filing deadline, as BFBFM claims. First, the applicable Commission rules do not expressly provide that a short-form application omitting this particular certification is unacceptable for filing and will be dismissed with prejudice (i.e., with no opportunity to supply the missing certification after the short-form filing deadline). In this regard, Section 73.5002(b) provides that "[t]o participate in broadcast service or ITFS auctions, all applicants must timely submit short-form applications (FCC Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 C.F.R. 1.2105(a) and any Commission public notices." Also, pursuant to Section 73.5002(c), applicants for a broadcast auction are subject to the provisions of 1.2105(b) regarding the modification and dismissal of their short-form applications. Section 1.2105(a) specifies information that must be included in the short-form application, but Section 1.2105(b) requires the dismissal with prejudice, without the opportunity to correct after the applicable filing deadline, only of any application "that does not contain all of the certifications required pursuant to this section," a narrower category of information. The certification as to media interests held by family members is not one of the certifications specified in Section 1.2105(a), the omission of which renders a short-form application unacceptable for filing and subject to dismissal under Section 1.2105(b), if provided after the short-form filing deadline. 21 Thus, although Section 73.5002(b) specifies that the short-form application must contain any certification required by a Public Notice, the rules do not provide notice that the omission of such a certification, as opposed to a certification required by Section 1.2105(a), will result in the dismissal of the short-form application with no opportunity to amend.

16. Second, the Bureaus' July 9, 1999 Public Notice, on which BFBFM relies, does not expressly state that the omission of this particular certification or of any certification not specifically listed in Section 1.2105(a) will render the short-form application

defective pursuant to Section 1.2105(b), such that it cannot later be amended. The Public Notice, although generally admonishing the pending long-form applicants to file complete short-form applications, only states generally that "[f]ailure to submit required information by the resubmission date will result in the dismissal of the application and inability to participate in the auction." 22 It does not state that failure to submit all of the requested information will render the application unacceptable for filing, such that the defect could not be cured after the filing deadline. Rather, this general admonishment merely echoes the general requirements applicable to all short-form information. As to that broader class of information, dismissal may be warranted after the filing deadline if the information is not provided, but only where the applicant has been advised by public notice that its application is defective and has failed to timely supply the information. See Section 1.2105(b)(3). The staff, however, did not advise Liberty of the omitted certification, nor afford it an opportunity to correct its short-form application by supplying the missing certification. 23 This circumstance, while insufficient to preclude the dismissal of an application subsequently found to have omitted certifications required by Section 1.2105(a) or to otherwise be in patent conflict with the Commission's rules, 24 further militates against BFBFM's suggestion that the earlier omission of the familial certification from Liberty's short-form application now warrants setting aside the results of the auction.

17. As noted, the record now contains the omitted information regarding Liberty's compliance with the Commission's policies relating to media interests held by family members. Liberty has submitted a declaration under penalty of perjury, dated November 24, 1999, from its sole general partner certifying that no member of her family has any interest in any medium of mass communications. 25 Having supplied the requisite certification regarding the insulation of the sole limited partner, 26 Liberty was generally required to submit ownership information only as to its sole general partner, Valerie Klemmer. Her declaration is

therefore sufficient to supply the omitted information as to compliance with the Commission's policies regarding media interests held by family members. The accuracy of the certification has not been challenged. The initial omission of information now supplied by her unchallenged post-auction declaration is therefore not an impediment to the grant of Liberty's long-form application. 27

18. Furthermore, as discussed above, the July 9th Public Notice, containing only a general admonishment as to the obligation to file complete short-form applications without specifying the consequences of omitting the certification in question, does not provide sufficient notice that a short-form application not containing the familial certification must be dismissed at this juncture even though the requested information has now been provided. 28 Fairness demands explicit notice for a severe sanction, such as the dismissal of an application. See generally Salzer v. FCC, 778 F.2d 869, 871-72 (D.C. Cir. 1985) ("fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration"); Trinity Broadcasting v. FCC, 211 F.3d 618 (D.C. Cir.2000), vacating the Commission's denial of an application to renew a license for violation of a regulation that was insufficiently clear to warn the licensee of what was expected; Satellite Broadcasting v. FCC, 824 F.2d 1 (D.C. Cir. 1987), setting aside the dismissal of an application that had not been timely filed in the correct location because Commission rules had not clearly specified the location at which the applications should be filed.

19. The absence of the certification in Liberty's short-form application is therefore not a basis to dismiss its application. Nor does fairness demand that we set aside the result of the auction and hold a second auction to select the permittee. BFBFM claims that it relied on the omitted certification in Liberty's short-form

application in developing its bidding strategy and that it would be unfair not to at least reauction the frequency under these circumstances. BFBFM, however, points to nothing in the Commission's rules, in its orders adopting the auction rules, or in Public Notices issued by the staff in connection with this particular auction affirmatively stating that the omission of the certification in question from a short-form application would warrant such an action. There were not, for example, conflicting provisions specifying different consequences for such an omission. Rather, BFBFM misinterpreted Sections 1.2105 and 73.5002 to require the dismissal now of Liberty's short-form application, based upon an over broad reading of the staff s July 9th Public Notice. That misunderstanding, however, does not warrant dismissing Liberty's application or impair the integrity of the auction so as to require that we set aside Liberty's selection as the permittee.

3. Amendment to Long-Form Application

20. Notwithstanding the contentions of Orion, Willsyr and BFBFM, there is no basis to reject the minor engineering change proposed in the amendment, filed November 10, 1999, by Liberty. The amendment was timely filed following Public Notices announcing the results of the auction and the resumption of the hearing proceeding to consider unresolved issues relating to the winning bidder's basic qualifications. 29 The Enforcement Bureau supports its acceptance, and the competing applicants, although raising various substantive objections to the amendment as discussed below, have not identified any technical deficiency that would bar its acceptance from an engineering standpoint.

21. Transmitter Site: When Liberty filed its application in August 1987, it specified a site located on Busbee Mountain. Upon learning that the site was unavailable, Liberty sought to amend to specify a second site. The ALJ, concluding that Liberty never had reasonable assurance of the original site, rejected the

amendment and ultimately disqualified Liberty on site availability and site certification issues. 30 Citing that determination, Orion and Willsyr challenge the post-auction amendment insofar as it specifies a third transmitter site. They urge that Liberty should not be permitted to amend to a new location when it never had reasonable assurance of a transmitter site in the first place. Willsyr relies on earlier cases rejecting for lack of good cause site amendments, where the availability of the original site was not shown. Sections 73.3522(a) and 73.3573, governing post-auction amendments, do not require that an amendment be supported by good cause and the unavailability of the original site would not, in any event, be a basis to reject a site amendment. Now that competing broadcast applications are to be resolved by competitive bidding procedures, rather than by comparative hearing, the Commission has repealed the requirement that broadcast applicants certify the availability of a suitable transmitter site. 31 Winning bidders in the frozen comparative cases face significant monetary penalties if they are disqualified for any reason (including the inability to secure a suitable transmitter site). 32 In these circumstances the Commission decided to adjudicate unresolved site issues, even against an auction winner, only to the extent there is a substantial and material question of false certification. 33

22. The site availability issue, moreover, was never finally adjudicated. The Review Board affirmed the ALJ's adverse resolution of that issue, and the Commission denied Liberty's application for review, as well as its subsequent petition for reconsideration. 34 Liberty, however, appealed the denial of its application for lack of a transmitter site to the United States Court of Appeals for the District of Columbia Circuit. As noted above, the court remanded this proceeding to the Commission without considering the merits of any issue raised on appeal. To reject Liberty's amendment based on our earlier, non-final determination on the site availability issue would effectively require that Liberty renew its court appeal of that ruling, and that the parties litigate an

issue that is no longer relevant now that the permittee will be selected by auction. Such litigation would, as we explained in the First Report and Order, serve only to delay service to the public and would, thus, disserve the public interest.

23. Cumulus Broadcasting: Orion urges that the amendment should be rejected on the separate ground that it impermissibly brings in a new investor, Cumulus Broadcasting. It relies in this respect on Liberty's September 10, 1999 loan agreement with Cumulus, reported to the Commission on September 27, 1999, the details of which were provided in the November 10, 1999 amendment. There, Liberty certified that, although the proceeds of the loan will exceed 33 percent of Liberty's total asset value, the agreement does not provide Cumulus an option to acquire the construction permit (or the license) and does not authorize it to broker time on or manage the station. According to Orion, Cumulus is the nation's third largest broadcaster with numerous media holdings and it would have a realistic potential to influence Liberty's conduct as a licensee. Orion further contends that the loan agreement, funded by such a large media group owner, undermines the Commission's premise that the auction price would reflect the applicants' similar prosecution expenses and circumvents the closed nature of the auction. It also cites the Commission's recent amendment of Section 73.5008, 47 C.F.R. 73.5008, to specify that certain debt interests are attributable for purposes of determining eligibility for the new entrant bidding credit. The loan agreement with Cumulus, according to Orion, represents the type of manipulation of the process by a large broadcast group owner that the rules were intended to prevent. It requests, finally, that the Commission order Liberty to submit copies of the September 10, 1999 loan agreement and any amendments to the agreement.

24. Section 309(1)(2) restricts qualified bidders to applicants who filed mutually exclusive applications before July 1, 1997. Neither the statute nor the Commission's implementing rules,

however, precludes applicants from borrowing money from a bank or another lender in order to participate in the auction. The Commission has specifically rejected the view that the closed nature of these auctions required the adoption of special disclosure requirements to ensure against the participation of new investors. The uniform Part 1 ownership disclosure standards, the Commission concluded, were sufficient to effectuate the purpose of Section 309(1)(2)'s requirement that the auction be limited to the pending applicants. But it agreed that, consistent with the Part 1 rules providing that a short-form application is considered newly filed and would be dismissed if it is amended by a major amendment, a change in the control of an applicant subject to 309(1), would render it ineligible to participate in the auction. 35 A major amendment to a long-form application subject to Section 309(1)(2) would likewise render the application ineligible to be granted after an auction that is statutorily restricted to applicants who filed their applications before July 1, 1997.

25. In this regard, the applicable auction rule, Section 1.2105(b)(2), 47 C.F.R. 1.2105(b)(2), provides that "an application will be considered newly filed if it is amended by a major amendment and may not be resubmitted after the applicable filing deadline." A major amendment is defined as including "changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid." That provision, significantly, has not been amended to reflect either the New Entrant Bidding Credit, or eligibility standards requiring the attribution of media interests of investors holding significant debt interests, as well as significant equity interests, in an auction bidder claiming new entrant status.36 A change affecting eligibility for the New Entrant Bidding Credit, in other words, does not necessarily constitute a major amendment within the meaning of Section 1.2105(b)(2). Thus, absent evidence that

Cumulus has a controlling ownership interest in the applicant, Liberty's September 17, 1999 amendment reporting the September 10, 1999 loan agreement does not constitute a major amendment within the meaning of Section 1.2105(b)(2).

26. The issue, therefore, is whether the September 10, 1999 loan agreement with Cumulus constitutes a change in the control of the applicant so as to warrant the dismissal of its application, or the rejection of the November 10 amendment, pursuant to the Part 1 disclosure standards. We conclude that it does not. The Cumulus loan was first reported in Liberty's September 27, 1999 amendment to its short-form application. And, in the November 10, 1999 amendment, Liberty has certified that, in accordance with the Part 1 rules, the loan agreement, as amended, does not provide Cumulus with an option to acquire the license or any right to broker time on or manage the station. 37 It has also stated that the agreement never contained such an option. 38 In these circumstances, there is no basis to direct Liberty to submit a copy of the loan agreement to the Commission, as Orion requests. Such submission would not be required under section 1.2112(a)(4) unless Cumulus had an ownership interest, or an option to acquire an ownership interest, in Liberty. Orion has not raised a substantial and material question as to the reliability of Liberty's certification that would warrant rejecting the November 10 amendment to Liberty's long-form application, or directing Liberty to submit a copy of the agreement.

27. To the extent Orion relies on the amendment of Section 73.5008, the adoption of special attribution rules governing eligibility for the new entrant bidding credit did not modify the applicable Part 1 disclosure rules. In deciding to attribute for this purpose certain debt and equity interests, the Commission "emphasize[d] that this debt/equity standard does not preclude an individual or entity (including any existing broadcaster) from investing any amount in a prospective broadcast auction applicant." 39 The adoption of special eligibility criteria is

therefore not a basis to reject Liberty's November 10, 1999 amendment.

28. Orion suggests, nevertheless, that Cumulus may have replaced Liberty's limited partner and 65 percent equity holder, David Murray. Only speculation supports the suggestion that there has been an (unreported) structural change in the applicant, however. Orion relies on certifications that Liberty made regarding Murray that were intended to support the claim that no ownership information needed to be provided for Murray. Specifically, Liberty certified in the November 10, 1999 amendment that Murray has not been involved (and will not be involved) directly or indirectly, in the management or operation of the applicant's media-related activities, that he is not a creditor of the applicant, and that his total equity contribution does not exceed 33 percent of the total asset value of the applicant. These certifications do not raise a substantial and material question that Murray no longer has an ownership interest in Liberty, but are completely consistent with his stated position as limited partner. And, as noted above, Orion has not raised a substantial and material question as to the reliability of Liberty's various certifications regarding the Cumulus loan agreement. In these circumstances, its funding of Liberty's participation in the auction is not inconsistent with Section 309(1)(2), or with the Part 1 disclosure rules generally, and this funding does not raise a substantial or material question that Cumulus has an ownership interest in the applicant. There is thus no basis to reject the amendment. We address below the separate question of whether media interests of Cumulus are attributable to Liberty for the purpose of determining Liberty's eligibility for the new entrant bidding credit. We note, however, that the provisions of the loan agreement have no relevance to that question inasmuch as Liberty does not rely on the terms of the agreement to support its claim that Cumulus' media interests are not attributable.

29. In a related context, we deny Willsyr's second motion to enlarge issues that likewise questions whether there has been an unreported change in Liberty's ownership structure. Willsyr relies primarily on representations contained in the November 10 amendment regarding the lack of involvement in partnership affairs and the extent of the equity contributions of Liberty's sole limited partner (David T. Murray). On this basis Willsyr seeks an issue to determine whether Liberty has misrepresented its ownership structure. (These representations relate to Liberty's certification that Murray's media interest is not attributable for purposes of the New Entrant Bidding Credit. 40) In this respect, the motion, filed December 13, 1999 is untimely. See Section 1.229(b)(3), 47 C.F.R. 1.229(b)(3), specifying that motions to enlarge issues based on newly discovered facts must be filed within fifteen days after the discovery of such facts. 41

30. Even assuming that the motion had been timely filed, it is without merit. It does not raise a substantial and material question of fact as to whether Liberty has misrepresented Murray as a current 65 percent limited partner. Willsyr focuses on the certification in the November 10 amendment that Murray's total equity contributions are less than 33 percent of the total asset value of the applicant and that there has been no communication with Murray since 1990. 42 It also cites the general partner's November 24, 1999 declaration stating that Murray's total equity contribution was only $36,000, although Willsyr's reliance on this additional information is less than clear. Without mentioning the Cumulus loan explicitly, Willsyr alleges that the "some $2 Million in debt" that Liberty assumed without communicating with Murray evidently diluted his partnership share. 43 But the declaration is clear that the general partner calculated that Murray's total equity contribution was less than 33 percent of total asset value before she certified on the short-form application that Liberty was eligible for the New Entrant Bidding Credit and before the September 10 loan agreement with Cumulus.

31. To the extent that Willsyr questions the continued status of Murray based on the substantial costs Liberty presumably incurred since 1990, the general partner has exclusive authority to borrow money on behalf of the partnership. Thus, the assertion that the partnership allegedly incurred significant expenses without asking for a further capital call from (or even communicating with) Murray does not raise a substantial and material question as to Murray's continued status as limited partner. And, in any event, Liberty disputes the costs alleged by Willsyr, and states that, thus far, it has only borrowed $303,680 from Cumulus. Finally, there would be no motive for Liberty to conceal the ouster or resignation of Murray as limited partner under the circumstances before us.

4. Eligibility for New Entrant Bidding Credit

32. Background: To fulfill its statutory responsibilities regarding designated entities, the Commission adopted a new entrant bidding credit for bidders with no, or very few, other media interests. 44 Section 73.5007(a) provides that "[a] thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other medium of mass communications, as defined in Section 73.5008." Section 73.5008(c) of the rules specifies that attributable interests in a winning bidder or in a medium of mass communications shall be determined in accordance with the broadcast multiple ownership rules (that is, 47 C.F.R. 73.3555 and note 2). Additionally, on August 5, 1999, the Commission amended that provision to provide for the attribution of media interests held by individuals and entities whose interest in the bidder would not otherwise be attributable under the Commission's multiple ownership rules (e.g., a lender or a limited partner not materially involved in the partnership's media activities). 45 Specifically, section 73.5008(c), as amended, specifies that: "[i]n addition, the

attributable mass media interests, if any, held by an individual or entity with an equity and/or debt interest(s) in a winning bidder shall be attributed to that winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder." The Commission advised that participants in the September 28, 1999 auction would be subject to the revised attribution standards. 46

33. To support its claimed eligibility for a 35 percent New Entrant Bidding Credit, Liberty certified on its August 19, 1999 short-form application that "neither it nor any of its attributable interest holders have any attributable interest in any other media of mass communications as defined in 47 C.F.R. 73.5008." On September 27, 1999, as noted above, Liberty amended the short-form application to reflect the September 10 loan agreement with Cumulus. Additionally, Liberty's November 10, 1999 amendment to the long-form application reflects that its 65 percent limited partner, David Murray, has a 50 percent interest in the permittee of a station in Colonial Heights, Tennessee. Liberty asserts that, for purposes of the new entrant bidding credit, the media interests of Cumulus are not attributable, because the loan agreement was executed after the August 20, 1999 deadline for filing short-form applications. The interest of David Murray is not attributable, according to Liberty, because his limited partnership interest does not exceed 33 per cent of Liberty's combined debt and equity.

34. Cumulus Broadcasting: Turning first to the September 10, 1999 loan agreement with Cumulus, we reject Liberty's assertion that, because the loan agreement was executed after the short-form filing deadline, the lender's numerous media interests are not attributable for purposes of the New Entrant Bidding Credit.

Liberty relies on language in the July 9, 1999 Public Notice, 47 advising that "[t]he bidder's attributable interests shall be determined as of the short form (FCC Form 175) filing deadline - August 20, 1999." 48 That statement, read in context, does not reflect that eligibility for the New Entrant Bidding Credit is unaffected by subsequent ownership changes, however. Indeed, the very next sentence in the Public Notice directs that "[b]idders intending to divest a media interest or make any other ownership changes, such as resignation of positional interests, in order to avoid attribution for purposes of qualifying for the New Entrant Bidding Credit must have consummated such divestment transactions or have completed such ownership changes by no later than the short-form filing deadline - August 20, 1999." Both sentences are in boldface. Read together, they clearly reflect that a bidder could not qualify for, or upgrade a previously claimed bidding credit, based upon ownership or positional changes occurring after the short-form filing deadline. But the impact of subsequent changes that, if recognized, would eliminate or diminish a previously claimed bidding credit is not expressly addressed.

35. That issue, as the Enforcement Bureau notes, was directly addressed in a later Public Notice, issued September 17, 1999, clearly reflecting that changes made after the August 20, 1999 short-form filing deadline could reduce, or completely eliminate, a previously claimed New Entrant Bidding Credit. In a section advising applicants of their Section 1.65 responsibility to maintain the accuracy and completeness of information contained in their short-form applications, bidders were "reminded that if ownership changes result in the diminishment or loss of a New Entrant Bidding Credit due to the attributable interests of new attributable interest holders, such information must be clearly stated in the bidder's amendment material." 49" In such cases," the staff advised, "the Commission will make appropriate adjustments in the New Entrant Bidding Credit prior to computation of down and final payment amounts due from any affected winning bidders."

Liberty narrowly reads the September 17, 1999 Public Notice as applying only to ownership interests. The language, however, expressly encompasses "attributable interests of new attributable interest holders." Cumulus, by virtue of its debt interest in Liberty, is a "new attributable interest holder." Because Cumulus's ownership interest in more than three broadcast stations is attributable to Liberty, there has been an "ownership change . . . due to the attributable interests of [a] new attributable interest holder[]."

36. Contrary to Liberty's assertion, the July 9, 1999 Public Notice is not a final action that became effective upon its release to the public and that is no longer subject to review or reconsideration. Prospective bidders were expressly advised in the July 9 Public Notice that "[t]he Commission may amend or supplement its public notices at any time, and will issue public notices to convey any new or supplemental information to bidders . . . [and that] it is the[ir] responsibility . . . to remain current with all Commission Rules and with all public notices pertaining to this auction." 50 Nor does the fact that the Commission continued to advise prospective bidders in subsequent broadcast auctions that eligibility for the New Entrant Bidding Credit would be determined as of the short-form filing deadline support Liberty's claims. Clearly, material included in public notices for subsequent auctions has no bearing on the terms governing this particular auction. More importantly, those notices contain the identical language quoted above indicating that, in order to avoid attribution for purposes of the New Entrant Bidding Credit, the divestiture of media interests must have been consummated by the short-form filing deadline. As in the case of the July 9, 1999 Public Notice, the cited language does not provide that eligibility for the New Entrant Bidding Credit is established as of the short-form filing deadline without regard to the subsequent acquisition of debt or equity interests.

37. Furthermore, Section 5008(c), as amended, is clear that the

media holdings of a lender are attributable, for purposes of the New Entrant Bidding Credit, if the lender's debt interest exceeds 33 percent of the bidder's total asset value. Liberty has certified in its November 10, 1999 Amendment, Exhibit D, that the proceeds of the Cumulus loan will exceed 33 percent of Liberty's total asset value. By virtue of its loan agreement with Cumulus, the numerous media interests of Cumulus are attributable to Liberty. Liberty is thus ineligible for the New Entrant Bidding Credit without regard to whether the media interest of its sole limited partner, David Murray, is also attributable.

38. Having concluded that Liberty does not qualify for the 35 percent bidding credit, we next consider the appropriate remedy. As the Enforcement Bureau notes, the Commission, in implementing its statutory obligations regarding the prevention of unjust enrichment, previously determined not to require reimbursement from licensees who utilized a New Entrant Bidding Credit to obtain a broadcast licensee if they subsequently acquired media interests that would have rendered them ineligible for the New Entrant Bidding Credit. The Commission's concern, 13 FCC Rcd at 15998 * 195, was that this would effectively punish the most successful broadcasters. The attribution of Cumulus' extensive media holdings, based on the pre-auction loan agreement and pursuant to the Commission's effort "to insure that only true new entrants qualify for the bidding credit," 14 FCC Rcd at 12543-45 * 7, does not raise similar concerns. The stricter attribution standards were based on a record reflecting "that holders of nonvoting stock and debt interests may be able to influence broadcast licensees in a significant manner" so that disregarding such interests "would be contrary to the new entrant bidding credit's diversification goals." Id. at 12545 * 7. In order to effectuate the intent of the revised attribution standards it is appropriate to require that Liberty remit in full its winning bid.

39. It is not appropriate, however, to dismiss Liberty's application or to set aside the results of the auction because it

incorrectly claimed the 35 percent bidding credit. For the reasons set forth in paragraph 25 above, there is no merit to BFBFM's contention that the change in Liberty's bidding status is a major amendment warranting the dismissal of Liberty's application pursuant to Section 1.2105(b) of the rules. We are also not persuaded that the change in Liberty's bidding status so alters the circumstances under which the auction was conducted as to require that we set aside its results. BFBFM is correct that we have generally refused to allow a bidder to change its designated status after an auction. We have taken this position in recognition of the facts that bidding credits confer significant advantages on auction participants and that a post-auction increase in such credits alters core circumstances likely to have influenced the bidding strategies of the other auction participants. 51 The same cannot be said for a post-auction change that removes a credit believed to have been in place during the auction. Clearly, Liberty's mistaken belief that it was entitled to a 35 percent bidding credit could have affected the amount it was willing to bid for the license. But we fail to see how that mistake would have deprived the other auction participants of information as to Liberty's valuation of the frequency, or would have otherwise influenced their bidding strategies. Indeed, requiring full payment of Liberty's winning bid preserves the integrity of the auction.

40. Nor is there a basis to add false certification or character issues, as requested by BFBFM and Willsyr, because Liberty erroneously claimed the 35 percent New Entrant Bidding Credit. Motions filed by BFBFM and Willsyr requesting such issues are therefore denied. Prior to the start of the auction and prior to the filing of any motions to enlarge issues, Liberty disclosed its loan agreement with Cumulus, acknowledged that the proceeds of the loan would exceed 33 percent of Liberty's total asset value, and explained its belief that Cumulus' media interests were not attributable. And, although the attribution of Cumulus' interests is required to effectuate the underlying purpose of the New Entrant Bidding Credit, Liberty's certification of eligibility under

the circumstances reflected above does not raise a substantial and material question that the certification was deliberately false, or otherwise raise a question as to the basic qualifications of either Liberty or Cumulus.

41. To raise a substantial and material question of deceit, it is necessary to show that the statement was inaccurate or materially incomplete and that there was an intent to deceive. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Intent may, as BFBFM suggests, be inferred from motive. Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). However, the Commission has generally not found an intent to deceive where the misstatement resulted from a mistaken interpretation of the law. High Country Communications, 4 FCC Rcd 6237, 6238 (1989). See also Baker Creek Communications, 13 FCC Rcd 18709 (WTB 1998) (finding bidder qualified for LMDS license despite its erroneous assertion of designated entity status, where applicant had fully disclosed its ownership structure and acted under the erroneous assumption that the structure comported with the requirements of the Commission's designated entity provisions).

42. Significantly, Liberty's view that Cumulus' interests are not attributable is based on a literal reading of language in the July 9, 1999 Public Notice. That interpretation, although erroneous, is not so specious or frivolous as to raise a question as to Liberty's truthfulness and reliability in dealing with the Commission. And, as noted above, Liberty divulged sufficient facts prior to the auction to permit a determination as to its eligibility for the New Entrant Bidding Credit. In these circumstances we find no basis for a false certification issue, particularly since this is the first case applying the requirements for entitlement to a bidding credit for new entrants. At the same time, however, we do not find BFBFM's request for a false certification issue so frivolous as to warrant, as Liberty suggests, the imposition of sanctions against BFBFM.

43. Although the date of the execution of the Cumulus agreement is irrelevant in determining eligibility for the New Entrant Bidding Credit, Liberty's truthfulness and reliability is pertinent in assessing its basic qualifications. See WOKO, Inc. v. FCC, 329 U.S. 223 (1946) (immaterial misrepresentations can be a basis for disqualification). Here, both BFBFM and Willsyr suggest that, contrary to Liberty's representation, the loan agreement may have been entered into prior to the August 20, 1999 filing. Willsyr, for example, intimates that the agreement may have been "formalized" after the short-form filing deadline. These allegations, however, are based on sheer speculation. As such, they likewise do not raise substantial and material questions of fact that would warrant the specification of misrepresentation or other character issues against Liberty.

44. David T. Murray: We agree with Liberty that, for purposes of determining eligibility for the New Entrant Bidding Credit, the media interests of its limited partner, David Murray, are not attributable, and that its failure to report these interests on its short-form application is not a basis to specify false certification and lack of candor issues. As required by Sections 73.5002(b) and 1.2105(a), governing such filings, Liberty's short-form application accurately reflected that Murray is a 65 percent limited partner. It also contained the requisite certification that "no limited partner is or will be involved, directly or indirectly, in the management or operation of the media-related activities of the partnership."52 Relying on the Bureaus' July 9, 1999 Public Notice reflecting that "ownership information need not be provided" with respect to such a limited partner, 53 Liberty did not disclose on its short-form application that Murray has a 50 percent ownership interest in Murray Communications, the permittee of Station WRZK, located in nearby Colonial Heights. That information was fully disclosed on Liberty's November 10, 1999 amendment to the long-form application, however. 54

45. BFBFM asserts that the attribution standards adopted August 5, 1999 made it clear that the media interests of an ostensible limited partner, such as Murray, are attributable. It surmises further that the media interest held by Murray renders Liberty ineligible for the claimed bidding credit, giving it a motive to conceal this interest. Merely stripping Liberty of its bidding credit, according to BFBFM, is an inappropriate remedy, because its misrepresentation compromised the integrity of the auction to the detriment of the other participants. Orion likewise asserts that the Commission made it expressly clear that it intended to consider not only the individual equity and debt interests of an investor, but also the extent of those combined interests.

46. As the Enforcement Bureau notes, however, Liberty adhered to Section 73.5008, as amended, in determining that Murray's media interests were not attributable for purposes of the New Entrant Bidding Credit. To the extent that Orion and BFBFM rely on statements in the text of the order revising Section 73.5008 explaining the rationale for the revised attribution standards or in notices announcing the revision, they do not allege that the rule is ambiguous. The rule's underlying purpose, however, cannot provide the fair notice required by due process except to the extent it is reflected in the language of the rule. Trinity Broadcasting, 211 F.3d at 63 1. The actual language of revised Section 73.5008(c) without regard to any statements as to the intended impact of the revision, therefore, must govern whether Murray's media interest is attributable. In this regard, the mass media interests of a limited partner are attributable within the meaning of Section 73.5008(c) only in two circumstances. First, such interests are attributable to the winning bidder to the same extent as those of a general partner, absent a certification of no material involvement by the limited partner in the management or operation of the partnership's media-related activities. 55 Murray's interest in the Colonial Heights station is not attributable on this basis because Liberty's August 19, 1999 short-form application contained the requisite certification of noninvolvement.

47. Second, despite such a certification, a limited partner's media interests are attributable pursuant to Section 5008(c) insofar as its equity and/or debt interest(s) in the winning bidder "exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder." Murray has a 65 percent equity interest in Liberty. But Liberty has certified that Murray is not a creditor of Liberty and that his total equity contribution to the applicant does not exceed 33 percent of its total asset value. 56 Additionally, Liberty has submitted a declaration, dated November 24, 1999 from its general partner, Valerie Klemmer. The declaration reflects that, before submitting the short-form application, she had determined that Murray's total equity investment of about $36,000 was substantially less than 33 percent of Liberty's total asset value of more than $120,000. 57 BFBFM has raised no substantial or material question as to the accuracy of that calculation or the reliability of Liberty's certification that Murray is not (and will not be) materially involved in the partnership's media-related activities. As such, the media interests of Murray are not attributable for purposes of determining Liberty's eligibility for the bidding credit. It is worth noting that, if Murray were the general partner, his media interest would be attributable without regard to his debt/equity contribution. To the extent that BFBFM suggests otherwise, it has misunderstood that, pursuant Section 73.5008(c) of the rules, the debt/equity calculus is relevant only with respect to interests that are not otherwise attributable under the Commission's multiple ownership rules.

48. We do not find that Liberty was less than forthcoming in failing to disclose on its short-form application that David Murray has an ownership interest in the Colonial Heights station. As Liberty notes, neither Section 1.2105, nor FCC Form 175 (short-form application), was amended to reflect the revised standards providing for the attribution, in certain circumstances, of media interests held by a limited partner. Having properly concluded that Murray does not have an attributable interest for

purposes of the New Entrant Bidding Credit, Liberty did not have an affirmative obligation to disclose, on the short-form application, either Murray's media interests or its basis for the conclusion that they were not attributable. Disclosure of his partnership interest, together with the general partner's certification that he has not been, and will not be, materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership was sufficient. Of course, it would have been helpful if Liberty's short-form application had also disclosed Murray's media interest and had included a certification that his 65 percent equity interest (plus no debt interest) was substantially less than 33 percent of Liberty's total asset value. Such disclosures on the short-form application might have avoided questions being raised concerning the media interests held by Murray. We cannot say, however, that Liberty breached any reporting obligation, or lacked candor, in failing to include thxis information on the short-form application.

5. False Site Certification Issue

49. Background: When Liberty filed its application on August 31, 1987, it specified a transmitter site on property owned by Vickey Utter. Liberty's general partner, Valerie Klemmer, certified that the applicant had reasonable assurance that the site would be available. In response to a motion to enlarge issues filed by Orion, the ALJ specified issues to determine whether Liberty has reasonable assurance of its site and whether it has made misrepresentations about the availability of the proposed transmitter site. 58

50. After an evidentiary hearing the ALJ resolved both issues against Liberty. Based upon the statements and deposition testimony of Vickey Utter that she had never agreed to lease or otherwise promised that Liberty could use her property as a transmitter site, the ALJ found that Liberty did not have reasonable assurance of its specified transmitter site and that

Klemmer had misrepresented facts about the availability of the transmitter site. This misrepresentation, the ALJ determined, was an independent basis for disqualifying Liberty. The Review Board, although reciting the ALJ's findings on both the site availability and the false site certification issues, 59 affirmed only the ALJ's adverse resolution of the former issue. Specifically, the Board agreed with the ALJ that "vague discussions with the site owner, and Liberty's hopes and expectations, do not support a finding that there was the requisite meeting of the minds required for reasonable assurance." 60 Having affirmed Liberty's disqualification for lack of a transmitter site, the Board did not consider the separate issue of whether Liberty's certification was false. 61 The Commission likewise affirmed Liberty's disqualification for lack of a transmitter site without addressing the merits of the false certification issue. Liberty appealed the denial of its application to the court of appeals. The court remanded the case to the Commission after Bechtel, without considering the merits of any issue raised on appeal.

51. As noted in *21 above, the Commission, in implementing its auction authority for commercial broadcast services, has repealed the requirement that broadcast applicants must certify the availability of a transmitter site. 62 We must, however, review the ALJ's determination that Liberty's general partner misrepresented the availability of the transmitter site when the application was filed, inasmuch as candor remains important. 63

52. Discussion: The issue before us concerns the state of Ms. Klemmer's mind when she certified on the August 31, 1987 application that Liberty had a transmitter site. We must determine whether that certification was deliberately false, or whether she believed (even if such belief was incorrect) that the landowner, Ms. Utter, had made a commitment to lease the site in the event Liberty secured the construction permit.

53. As an initial matter, we decline Liberty's invitation to revisit the site availability issue. The Review Board denied Liberty's exceptions on this issue, and the Commission denied Liberty's application for review and petition for reconsideration. The fact that it did so without specifying reasons is not, as Liberty submits, a basis for the Commission to again consider this issue. Although the Commission's resolution of the site availability issue is not final, it would be a waste of private and public resources to reconsider an issue that is no longer relevant to Liberty's basic qualifications, now that the construction permit is to be awarded after an auction. In this respect, Willsyr's reliance on Damsky v. FCC, 199 F.3d 527 (D.C. Cir. 2000), involving an analogous issue that would be rendered moot under auction procedures, is misplaced. There, the court affirmed our adjudication of the financial issue against a non-settling applicant in the context of a settlement agreement filed before the implementation of auction procedures. By virtue of the settlement, Damsky was decided without resort to an auction or the policies pertinent to our auction procedures. In this case, however, there has been no settlement agreement or other circumstance making it appropriate to adjudicate an issue that would be relevant only if the licensee were selected through a process other than an auction.

54. Despite our determination not to revisit the site availability issue (that is, whether there was a meeting of the minds sufficient to establish reasonable assurance of a transmitter site), we recognize that resolution of the false certification and site availability issues both entail consideration of the disputed events of August 1987 when Liberty principal Valerie Klemmer, accompanied by Tim Warner, allegedly discussed with landowner Vickey Utter the possibility of using her property for a transmitter site. There is thus some similarity between Liberty's contentions regarding its disqualification on the false certification issue and arguments previously rejected by the Commission in upholding the ALJ's adverse resolution of the site availability issue. Inasmuch as Liberty's disqualification on the site issue has not become final

(and will never be litigated to a final decision), the principles of res judicata do not, as BFBFM suggests, preclude challenges to underlying findings of fact made in connection with the site availability issue, insofar as they also pertain to the false certification issue. 64 Nor are, as Orion suggests, challenges to the reliability of record evidence barred by the Commission's rejection of virtually identical claims in upholding the ALJ's adverse resolution of the site issue. But more important here, as a matter of law the determination that there was not a meeting of the minds between Klemmer and the site owner sufficient to establish reasonable assurance of Liberty's original site does not foreclose a determination that Klemmer mistakenly believed that the landowner had agreed to lease the property and thus made the certification in good faith. Resolution of the misrepresentation issue thus requires us to consider an additional factual question not previously addressed in either the Board's or the Commission's disposition of the site availability issue.

55. Turning to the merits of the false certification issue, it is well established that substantial evidence of an intent to deceive is necessary to support a finding of misrepresentation. 65 For the reasons that follow we conclude that the ALJ's disqualification of Liberty on the false certification issue is not supported by substantial evidence. At the outset, we note that, contrary to the assertions of BFBFM, Orion and Willsyr, the ALJ made no credibility findings against Liberty that are entitled to special deference on review. 66 Indeed, the Initial Decision is devoid of any specific finding addressing the credibility of either Ms. Klemmer or Tim Warner, who also testified about this issue. The ALJ does not acknowledge, let alone assess the credibility of, Mr. Warner's lengthy testimony about the negotiations Klemmer claims to have had with Ms. Utter before certifying on Liberty's application that it had reasonable assurance of a transmitter site located on her property. Nor does the Initial Decision cite any aspect of Ms. Klemmer's demeanor -- including the expression of her countenance, how she sat or stood, whether she was

inordinately nervous, her coloration during critical examination, or other non-verbal communication - which might convince an observing judge that a witness was testifying falsely or truthfully but which would be unavailable to a reader of the written transcript. 67 Ms. Utter, whose recollection concerning the site contradicts that of Liberty's witnesses (Klemmer and Warner), did not testify at the hearing. As such, the ALJ's conclusion, based on the deposition and statements of Utter, that Klemmer intentionally deceived the Commission in certifying reasonable assurance of a transmitter site was not based on any specific credibility findings that are entitled to special deference on review. 68 And, as the Enforcement Bureau notes, the ALJ did credit Klemmer's testimony on other matters.

56. The language cited by the competing applicants does not support their contention that the ALJ made credibility findings against Liberty. The ALJ, in resolving the false certification issue against Liberty, found that "Valerie Klemmer has blatantly dissembled in a manner that doesn't befit a prospective broadcast applicant." Initial Decision, 5 FCC Rcd at 2879 * 8. This, however, merely reflects the ALJ's ultimate resolution of the issue. Ms. Klemmer "had blatantly dissembled," the ALJ concluded, because "when [she] represented to the Commission that Liberty had available the site specified in their application, she...knew she had no basis for so certifying." He found further that "it strains credibility ... [t]o argue that her feeble, half-hearted effort to obtain some of Vicki [sic] Utter's land on Busbee Mountain constitutes 'reasonable assurance.'" What "strain[ed] credibility," in the ALJ's view, was not the testimony of Ms. Klemmer or any other witness as to the facts and circumstances surrounding her certification, but that Ms. Klemmer could believe that the landowner had promised to lease the site. These determinations based upon the ALJ's assessment of the evidence presented, however, do not constitute credibility findings. The lack of specific credibility findings, while not undermining the legal sufficiency of the ALJ's ultimate determination of

misrepresentation, affects the nature of the review pertaining to that conclusion on appeal. Because that determination is not supported by specific demeanor findings, we accord it no special deference but assess whether the ALJ's determination is supported by substantial evidence in the record. It is the right and the duty of the trier of fact to assess the credibility of any witnesses based on his observations of their demeanor. But where, as in this case, the presiding judge has not made any specific demeanor findings, a reviewing body must proceed to make its own findings of fact without the benefit of a dispassionate ALJ's appraisal of the witnesses. 69

57. Based upon our required de novo review of the record, we find that substantial evidence in the record does not support the ALJ's conclusion that the certification was deliberately false. Relying primarily on Utter's statements and on the existence of a written lease for virtually the same transmitter site executed only days before she purportedly made an oral commitment to lease that property to Klemmer for the same purpose, the ALJ found that "what appears to have happened" is that Klemmer, apprised of the need to make an immediate payment to secure the landowner's commitment to lease her property to Liberty, declined to do so and went ahead and made the certification on Liberty's application. 70 Substantial evidence does not support that finding, however.

58. The record reflects that, before certifying reasonable assurance of a transmitter site, Valerie Klemmer investigated only one site, located on property owned by Ms. Utter, and that she believed, based upon her brief August 1987 meeting with Utter, that Utter had agreed to lease her property for $4000 per year if Liberty got the license. Klemmer had contacted Utter at the recommendation of her friend and neighbor, Tim Warner, who worked at local noncommercial station WCQS. (Tr. 651-52, 849, 851, 933) Warner had dealt previously with Utter and already knew that her property was desirable as a transmitter site. (Tr. 841, 835, 849) Klemmer's detailed and lengthy testimony as to

what transpired when she met with Utter approximately five days before Liberty's application was filed, is corroborated in all material respects by the testimony of Tim Warner, who also attended that meeting.

59. At the meeting, which Klemmer had arranged, Warner introduced Klemmer and identified her as an applicant for the Biltmore Forest FM station. (Tr. 670, 871) Utter remarked that there had been a lot of recent inquiries about using her property for a site. (Tr. 676-77) According to the testimony of Klemmer and Warner, however, Utter did not specifically name anyone who had contacted her regarding a site or indicate that she had agreed to lease her property for that purpose. (Tr. 676-77, 679, 876-77, 940-42) Warner is certain he would have remembered any mention of Brian Lee having a lease with Utter since the Lee family was well known. (Tr. 940) Both Warner and Klemmer claim that, when Liberty's application was filed, they were unaware of the written lease executed August 21, 1987 between Utter and Orion's Brian Lee. (Tr. 659, 676-79, 915, 941, 987) Under the terms of that lease Utter was entitled to yearly payments of $1500 that increased to $4000 once the tower was constructed. The lease was for three years, and was renewable, at the lessee's option, for two three-year terms. (Orion Ex. 4; Tr. 2462-64)

60. Klemmer and Warner testified that they indicated that Klemmer was interested in leasing a portion of Utter's property for use as a transmitter site, and that their conversation with Utter included a discussion of the annual rent and the location of the tower. (Tr. 872) Klemmer, aware of the need to firm up the cost in order to secure reasonable assurance, asked Utter how much the rent would be. (Tr. 653, 672, 674, 922) When Utter indicated she would need $4000 and Warner indicated that this was a fair price, Klemmer advised Utter that $4,000 was acceptable. 71 (Tr. 655-57, 878-80) Both Warner and Klemmer believed, based on their August 1987 conversation with Utter, that she had agreed to lease her property for $4000.00 annually if Liberty got the license,

and that she understood that Klemmer would not need the site for 18 months to two years, since FCC proceedings tend to be lengthy. (Tr. 661, 665-67, 680, 810, 884-86, 889, 961) They understood further that if Liberty received the construction permit, Utter would be willing to sign a lease at that point. (Tr. 893) Klemmer believed that the only thing left to work out was the duration of the lease. 72 (Tr. 810-13)

61. Further contributing to Klemmer's belief that she had reasonable assurance of a site was that the August 1987 meeting with Utter included a discussion, largely between Utter and Warner, as to the general location of the site. Klemmer, having no experience in selecting transmitter sites, relied on Warner, who had a great deal of experience in this area and had dealt previously with Utter. (Tr. 653, 662-63) He recommended that the site be located at the highest possible elevation and as close as possible to the television tower already located on Utter's land, and he pointed to a relatively flat area between the dog pen and the tower. (Tr. 881-83) Both Warner and Klemmer understood from the August 1987 meeting that this area was acceptable to Utter, in part because of its close proximity to the existing television tower. (Tr. 663, 678, 881-83)

62. After meeting with Utter, Warner and Klemmer discussed whether she could make a certification of reasonable assurance on Liberty's application. (Tr. 875) Based on Warner's experience in securing transmitter sites, Warner's previous dealings with Utter, and the television tower already located on Utter's property, Warner and Klemmer believed that Utter's oral commitment to enter into a future lease was sufficient. (Tr. 681, 809, 905) Warner had had considerable experience in securing transmitter sites for Station WCQS, and on at least one occasion he had been the one to certify reasonable assurance on an FCC application. (Tr. 825, 952-55) Additionally, he had an oral agreement with Utter allowing station employees to cross her land in order to work on the station's tower located on adjacent property. (Tr. 845, 846)

His experience was that Utter was willing to enter into verbal agreements, that she honored such agreements, and that she had never required either a written agreement or monetary compensation to secure a verbal promise for a current lease of her property. (Tr. 898-99, 964) Warner was comfortable advising Klemmer that she had obtained reasonable assurance, as defined by the Commission, of a future lease of Utter's property for use as site if Liberty were awarded the construction permit. (Tr. 899-900) His understanding from station WCQS's attorney is that, so long as a commitment is obtained from the landowner, there is no need for a written agreement. (Tr. 976) This is what Warner advised Klemmer, but he also told her to check with her own attorney before making the certification. (Tr. 906)

63. Other than Liberty's evident interest in establishing its basic qualifications, there is little reason to reject the detailed testimony of Klemmer and Warner. First, the competing applicants urge us to infer a motive to misrepresent the site's availability from the fact that Klemmer, having contacted Utter only days before the August 31, 1987 filing deadline, did not investigate any alternative sites. The record is clear, however, that Warner advised that Utter's was the best site but that there were other suitable sites.(Tr. 834-35, 957) The desirability of Utter's property is corroborated by Brian Lee, who testified that Orion's engineer had likewise advised that a site on Busbee Mountain would be preferable. (Tr. 2445) The availability of other suitable sites is illustrated by the fact that the original thirteen Biltmore Forest applicants specified eleven different sites and by the ease with which Liberty, upon learning in March 1989 that Utter was no longer willing to lease her property, specified a second site. 73 Significantly, Liberty in its November 10, 1999 amendment has specified a third site, located on property adjacent to Utter, that it proposes to share with noncommercial station WCQS.Neither the timing of the negotiations with Utter, nor the failure to investigate other sites is probative evidence that Klemmer knew the most desirable site was unavailable when she certified its availability.

64. The competing applicants also attack the credibility of Warner's testimony, asserting that he is not a disinterested witness. But we discern no basis to infer a motive to deceive on Warner's part. Despite lengthy cross-examination and repeated questioning by the ALJ, there is no evidence that Warner has any interest in, or managerial position with, Liberty. Warner, a career public broadcaster, is fairly committed to public radio and, although he does not foreclose the possibility of a really good offer tempting him into commercial radio, he repeatedly testified that he had no interest in the Biltmore Forest FM station and no ownership interest in Liberty. 74 (Tr. 856-57, 951) It is unclear that friendship, standing alone, would motivate Warner to perjure himself on Liberty's behalf, particularly given his commitment to public broadcasting and his station's ongoing contractual relationship with Utter at the time of the hearing. It is problematic, in our view, that Warner would have been willing to jeopardize a relationship on which Station WCQS depended to access its site, and presumably his position as station manager of that station, by testifying falsely as to the events surrounding Liberty's specification of a site. Our analysis is not changed by the fact that Klemmer has apparently retained Warner to provide engineering services in connection with Liberty's November 10, 1999 filing insofar as it seeks to amend to a new transmitter site that, as reflected above, is to be shared with Station WCQS. 75

65. We note, moreover, that despite Klemmer's extensive reliance on Warner in selecting the site and in negotiating with Utter, his pre-certification efforts on Liberty's behalf were based primarily upon information already available to Warner and entailed a minimal time commitment. Warner had been contacted by other potential Biltmore Forest applicants for advice in locating a site, because of his experience in selecting sites generally and because of the location of his station's tower on Busbee Mountain. (Tr. 830-31) He knew that Utter's property would be suitable for Klemmer's purposes, given his dealings with Utter and his investigation of other Busbee Mountain sites. (Tr. 833-35, 843,

848-49) He also knew that Utter's property was one of the few without restrictive covenants precluding the construction of a tower because, in exploring alternate sites for WCQS, he had researched the deeds in the spring of 1987. (Tr. 837, 840-41, 843-44) We do not find it incredible that a neighbor and friend would be willing to give advice, based largely on his own expertise and involving little time commitment, without expecting an interest in the application. Neither Warner's friendship with Klemmer, nor the extent of her reliance on his expertise, provide a basis to infer that Warner had a motive to deceive the Commission or to otherwise reject his very extensive testimony as to what occurred when he and Klemmer met with Utter in August 1987.

66. There is a direct conflict, we recognize, between the testimony of -arner and Klemmer and the denials of Vickey Utter that she ever gave Valerie Klemmer or anyone connected with Liberty any assurance that her property would be available for a transmitter site. But as noted by the Enforcement Bureau, based on its independent analysis of this matter, Utter's deposition testimony and various statements are inconsistent and, viewed in the best light, reflect only a very sketchy recollection of the events of August 1987 concerning the possible lease of her property for construction of a tower.

67. In this regard, the record shows that Orion's Brian Lee asked Vickey Utter to explain Liberty's specification of virtually the same piece of property that was the subject of their August 21, 1987 written lease. In response, she signed a statement under penalty of perjury on February 22, 1989, declaring that she did not know Valerie Klemmer, had never heard of Liberty Productions or given any representative of Liberty any assurance that her property would be available for use as a transmitter site. 76 The substance of that statement was largely withdrawn, however, after a visit from Warner and Klemmer on March 10, 1989, refreshed Utter's recollection of the August 1987 encounter. During that

visit Utter refused to sign a statement Klemmer had prepared indicating her willingness to lease the site if Liberty received the construction permit. But she drafted and signed a second statement on March 13, 1989, reflecting that she then remembered meeting with Valerie Klemmer and Tim Warner about one and a half years before and discussing the possibility of leasing a portion of her land to Klemmer for a tower. 77 In that second statement, Utter indicated that "[a]t that time I told them that I had leased a portion of my land to Brian Lee for a tower to be constructed should he be awarded the new FM station. It was also discussed the possibility [sic] of leasing Valerie a piece of land for the same purpose but since she never contacted me again I assumed she found someplace more suitable for her project." At the request of Brian Lee and Orion's attorney, Utter signed a third statement on March 29, 1989. 78 In addition to repeating information to explain the inaccuracies in the February 22, 1989 declaration, Utter stated in the March 29, 1989 statement that: "We talked, in my yard, for a brief period concerning my property lease to Brian Lee. At that time or any other time I never gave Valerie the promise or assurance that she could use my land or my name when she filed the application with the FCC."

68. Ms. Utter was deposed on April 27, 1989. Her deposition testimony reflects only a vague memory of the meeting with Klemmer and Warner. She did not recall being introduced to Klemmer or being told of her intention to apply for the FM station. She had no idea why Klemmer had accompanied Warner, and assumed that she was connected with Warner's station, whose tower was located on property adjacent to Utter's. (Liberty Ex. 13, p. 24-28). And, despite her March 13, 1989 statement, she had no recollection of ever discussing the possibility of leasing Valerie Klemmer a portion of her land for a tower. (Liberty Ex. 13, p. 27). She claims to have included that statement in the March 13, 1989 document because Warner insisted that there had been such a discussion. (Liberty Ex. 13, p. 41). Yet, according to Brian Lee's testimony, she remembered this discussion and she had no qualms

about entering into a lease with someone else for another portion of her property. (Tr. 2501-04) Her deposition testimony confirms that, as reflected in her March 13 and 29, 1989 Statements and as recounted by Brian Lee (Tr. 2499-500), she remembered discussing their written lease with Klemmer and Warner when they stopped by her house in August 1987. Utter's recollection is that Warner was aware of the lease, and even knew the annual rent. Her vivid recollection of a snippet of an otherwise forgotten conversation is a bit curious. Also troublesome is her admission in her deposition that she had included information in the March 13, 1989 statement, of which she had no independent recollection, based entirely on the recollection of others.

69. Thus, even crediting only the deposition testimony and various statements of Ms. Utter (and disregarding entirely the contrary testimony of Klemmer and Warner), there is not substantial evidence of an intent to deceive. Utter's statements, rather than providing a comprehensive and coherent account of the disputed events, reflect only that she has no clear memory of the August 1987 conversation with Klemmer and Warner. In her statements and in her deposition she has variously denied that any meeting occurred at all, or recalled meeting Klemmer but not being aware that Klemmer intended to apply for the FM station, or meeting with Klemmer and specifically discussing a lease for the FM station. In the circumstances, and given Utter's inconsistent statements, we do not give substantial weight to Utter's assertions that purport to provide detailed descriptions of what was said or might have been said, including, for example, her certainty that in any discussion of leasing her property, she would have insisted on a commitment (presumably a monetary payment) from Liberty, and would have expected Klemmer to contact her again. (Deposition at 41-42, 45 (Liberty Exhibit 13); March 13, 1989 Statement; March 29, 1989 Statement) She is likewise sure that, in August 1987, Warner and Klemmer were aware of her written lease with Brian Lee. (Deposition at 26-27, 41; March 13, 1989 Statement; March 29, 1989 Statement)

70. The record reflects, moreover, that Utter understood that only one applicant would ultimately need a transmitter site and that Brian Lee would not likely renew the lease unless Orion received the license. (Tr. 2502; Liberty Exhibit 13, p. 14) In these circumstances, there may have been a casual discussion of a future lease with Klemmer, long forgotten by Utter, that Klemmer and Warner, not fully understanding that reasonable assurance requires something more than a possibility of a future lease, misconstrued as providing reasonable assurance. Consistent with her only vague recollection of these events, moreover, she might have felt compelled to reassure Brian Lee that, while she did not feel constrained from leasing other portions of her property, she had advised Klemmer and Warner of the written lease agreement for Orion's site, whereas Klemmer and Warner testified that she had not done so. None of this provides substantial evidence that, when Klemmer certified reasonable assurance, she knew that the certification was false.

71. One final matter warrants comment. The existence of the written lease with Brian Lee is admittedly troublesome. It is somewhat problematic that Utter, having just signed a lease providing for up-front payments before the license was awarded, would have been willing to consider leasing Valerie Klemmer a portion of her property for the same purpose without requesting a similar monetary commitment. 79 For purposes of the false certification issue, however, the pertinent question is not whether Utter had agreed to lease the site to Liberty if it received the construction permit. The critical question instead is Klemmer's understanding at the time of certification. Particularly in the absence of any reliable evidence that Klemmer was, or should have been, aware of Brian Lee's lease at that time, its existence is not probative of false certification. Apart from Utter's otherwise faulty recollection of her August 1987 conversation with Klemmer and Warner, however, there is nothing to indicate that anyone connected with Liberty was aware of the lease at the time of certification, or that, during that conversation, Utter had demanded

a similar written commitment from Liberty. Awareness of Brian Lee's lease, moreover, cannot be inferred from its recordation on August 21, 1987. Warner's research of the Busbee Mountain properties ended in March or April 1987, and there is no evidence that Klemmer's former husband, a real estate attorney, was involved in any transactions concerning Busbee Mountain during the pertinent time period. (Tr. 944) Nor can awareness of the lease be inferred, as Willsyr suggests, from the location of Liberty's originally specified transmitter site. It contends that the area described in the August 21, 1987 lease is the best possible site, and that Liberty's specification of a different (less desirable) site can only be explained by its awareness that Utter had already agreed to lease the more desirable portion of her property to Orion's Brian Lee. But the terms of the lease do not include an exact specification of the site. The location of Orion's site, therefore, could not have been determined from the August 21, 1987 lease. The coordinates of the sites specified by Orion and by Liberty, moreover, vary by only one degree. Furthermore, Warner's detailed testimony reflects that the site's location was influenced by the terrain of the land and by Utter's desire that it be as close as possible to the existing television tower, and that its location on higher ground made Liberty's original site preferable to Orion's site. (Tr.881-83)

72. There is, in sum, no basis to reject the consistent testimony of Klemmer and Warner, contradicted only by Utter's faulty recollection, that they first learned of the written lease in March 1989 after the filing of Orion's petition to add the site availability and site certification issues against Liberty, and that they believed, based upon their August 1987 conversation, that Utter had expressed a willingness to lease the land to Klemmer in the event Liberty was the successful applicant. Only the hearsay testimony of Brian Lee as to what Utter told him in early 1989 about what had occurred in August 1987, and the existence of the Utter-Lee lease lend credence to Utter's version of what occurred. Particularly in light of Utter's admitted lack of recollection and her

clear interest in reassuring Orion's Brian Lee that her dealings with Liberty were consistent with their written lease arrangement, neither the existence of the lease nor Utter's various statements and deposition testimony provides substantial evidence that Klemmer deliberately misrepresented the availability of the site when she certified reasonable assurance. 80 Indeed, if Utter had told Liberty about her lease agreement with Orion and had then specifically relied on it to demand a similar commitment from Liberty, it is difficult to believe that Liberty would have falsely certified about a matter relating to a site location so well known to a competing applicant. Because we find no probative evidence of intentional deceit by Klemmer, let alone substantial evidence of such deceit, we reject the ALJ's findings on the false certification issue and reverse his disqualification of Liberty on this issue. We conclude, therefore, that Liberty is basically qualified to be awarded the construction permit for a new FM station on channel 243A in Biltmore Forest.

IV. ORDERING CLAUSES

73. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval of Settlement, filed November 14, 2000 by Biltmore Forest Broadcasting FM, Inc. and Liberty Productions IS DENIED, and the Motion to Strike, filed January 8, 2001 by Orion Communications, Ltd. IS DISMISSED as moot. 81

74. IT IS FURTHER ORDERED, That the Motions to Strike Reply to Opposition, filed on December 29, 1999 by Orion Communications Limited and on January 3, 2000 by Willsyr Communication Limited Partnership, ARE DENIED; 82 and the Amendment, tendered for filing on November 10, 1999 by Liberty Productions, A Limited partnership IS ACCEPTED.

75. IT IS FURTHER ORDERED, That the Motions to Enlarge Issues, filed on November 12, 1999 by Orion Communications Limited and by Biltmore Forest Broadcasting FM, Inc. ARE

DENIED; and that the Motion to Enlarge Issues and the Second Motion to Enlarge Issues, filed on November 24, and December 13, 1999 by Willsyr Communications Limited Partnership ARE DENIED.

76. IT IS FURTHER ORDERED, That the Motion to Dismiss Replies, filed on February 7, 2000 by Orion Communications Limited IS DENIED; 83 that National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990), is set aside to the extent reflected herein; and that the hearing proceeding in MM Docket No. 88-577 IS TERMINATED.

77. IT IS FURTHER ORDERED, That, subject to full payment of the gross amount of Liberty's high bid of $2,336,000 for the permit and full compliance with all of Commission's payment procedures, the application filed by Liberty Productions, A Limited Partnership (File No. BPH-870831 MI), as amended, IS GRANTED; and that the following applications ARE DISMISSED: (a) Willsyr Communications Limited Partnership (File No. BPH-870831 MJ); (b) Biltmore Forest Broadcasting FM, Inc. (File No. BPH-870831 MK); (c) Skyland Broadcasting, Inc. (File No. BPH-870831 ML); and (d) Orion Communications Limited (File No. BPH-870831 ME).

FEDERAL COMMUNICATIONS COMMISSION

Magalic Roman Salas
Secretary

Dissenting Statement of Commissioner Gloria Tristani

In Re Applications of Liberty Productions, a limited partnership, Willsyr Communications limited partnership, Biltmore Forest Broadcasting company, Orion Communications Limited, for a construction permit for a new FM broadcast station on channel 243A at Biltmore Forest, North Carolina

Because I do not believe the record justifies reversing both the F.C.C. Review Board ("Review Board") and the F.C.C. Administrative Law Judge ("ALJ") who held the hearing and heard the witnesses in this matter, I respectfully dissent. I write separately because the majority's decision renders our rule against misrepresentation by a licensee almost unenforceable by requiring direct proof of intent to deceive. 1

I. Procedural History

The ALJ held a trial-type hearing lasting 8 days. 2 The ALJ framed the issue:

> To determine whether Liberty has made misrepresentations to the Commission about the proposed transmitter site's availability, and, if so, what impact that has on Liberty's basic qualification to be a Commission licensee. 3

The factual dispute arose from a conversation between the landowner of the tower site, and two witnesses for Liberty. At the hearing, Liberty's two witnesses Valerie Klemmer and Tim Warner testified about the meeting with the site owner. 4 Liberty subpoenaed the site owner, Ms. Vickey Utter, but declined to enforce the subpoena, instead relying on her deposition and sworn statements. 5 Following the proceeding the parties submitted findings of fact and conclusions of law. 6 After hearing from Liberty's witnesses, the ALJ rejected their testimony stating:

When Valerie Klemmer certified to the Commission that Liberty had a transmitter site, she had absolutely no basis for doing so. Moreover, she knew she had no basis for so certifying. 7

After the ALJ's adverse disposition, Liberty sought relief from the Review Board. 8 The Review Board affirmed the ALJ stating:

> The ALJ found that Liberty never had reasonable assurance that the site which it specified in its application was available, and that its principal falsely certified that the transmitter site was available because, "she had absolutely no basis for doing so. Moreover she knew she had no basis for so certifying." His findings and conclusions were based on the verified statements and deposition testimony of the site owner. Her testimony was in turn corroborated by the fact that other applicants who has sought permission to use her land were required to enter into a written lease. 9 (emphasis added)

The Review Board went on to conclude that Liberty's two witnesses supported, rather than controverted the ALJ's findings, stating:

> Like the ALJ, we find no reason in the record to reject the firm denial of the site owner that she had ever given assurance to Liberty that the property would be available, especially where twice before she had insisted on written agreements. 10

Following a remand from the D.C. Circuit for reasons unrelated to the merits of this dispute, the matter ultimately came before the Commission. The majority reverses because, "we find that substantial evidence in the record does not support the ALJ's

conclusion that the certification was deliberately false." 11 The majority supports this conclusion saying, "no probative evidence of intentional deceit," exists and by relying on the failure of the ALJ to make a "specific finding addressing the credibility" of Klemmer and Warner, Liberty's witnesses. 12 The majority thus reaches a different conclusion than the ALJ who heard the testimony, and the Review Board that examined the entire record.

II. Substantial Evidence Exists that Liberty Falsely Certified the Availability of the Tower Site and is Unqualified to be an F.C.C. Licensee.

De novo review is not trial de novo. Thus, while de novo review authorizes a review of the whole record without deference to facts found by the ALJ, there can be no doubt that our law universally favors disposition of questions of credibility or motive by the person or body that hears the testimony. De novo review in the instant case means we must consider whether the challenged outcome was based on a consideration of the relevant factors, whether there is record evidence to support the disposition and whether there has been a clear error of judgment. While this inquiry must be searching and careful, a hearing on the merits before an ALJ should be, "the 'main event,' and not simply a 'tryout on the road' to appellate review." 13

Here, the property owner swore she did not give any assurance whatsoever to Ms. Klemmer that the property would be leased to Liberty. If credited by the factfinder, this fact alone is substantial evidence sufficient to sustain the adverse determination against Liberty. Moreover, as the Review Board noted, the rejection of Ms. Klemmer and Mr. Warner's testimony is supported, rather than controverted by the record. The sworn testimony of Ms. Utter was not undermined by extrinsic evidence and was actually supported by the submission of an existing written lease with Liberty's competitor, Orion. The lease was probative of the fact that Liberty did not receive the type of site availability assurance Ms. Utter knew how to give, and in fact had given to Orion. As

found by the ALJ and the Review Board, there is substantial evidence that Liberty's witness, Ms. Klemmer, knew the representations she made to the Commission regarding the availability of Ms. Utter's land were simply false.

A. The Majority Errs When it Holds No Probative Evidence of Licensee Deceit Exists in this Record.

Despite the existence of "admittedly troublesome" documentary evidence, and a "direct conflict" between the testimony of the site owner and Liberty's witnesses, the majority makes the surprising claim that the record contains no "probative evidence" of deceit by Liberty. 14 "Probative evidence" has an evidentiary meaning quite distinct from that which the majority attributes to it. 15 Careful examination of paragraphs 58-72 of the majority's opinion discloses not a lack of probative evidence but instead a complete reweighing of the evidence and testimony presented.

While perhaps permissible, such reweighing is not advisable. The majority's review of the record proves too much. It is precisely material inconsistencies and contradictions in and between the evidence and testimony that is sufficient to support adverse credibility determinations. 16

B. The Majority Errs When it Requires Direct Evidence of Intent to Deceive.

The most troubling aspect of the majority's approach is its conflict with our cases on the quantum of evidence necessary to find misrepresentation by licensees. It is well settled that, "intent to deceive" is a necessary element of proving misrepresentation or lack of candor in FCC proceedings. 17 The evidence reviewed by the ALJ and the Review Board is more than sufficient to support the finding that Liberty did misrepresent the site's availability and intended to deceive the Commission. The D.C. Circuit has said,

> [T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent. 18

Applying the D.C. Circuit's logic, the majority's preference for an explicit finding that Liberty's witnesses lied, instead of the existing finding that Liberty's witnesses had no basis for their representations to the Commission, is a distinction without a difference. But, it has the unfortunate effect of suggesting the Commission will not find intent to deceive unless there is a smoking gun. Questions of credibility, motive and state of mind are almost universally resolved by reasonable inferences from direct and circumstantial evidence. The D.C. Circuit has said, "[I]n almost any claim involving motive, a [civil] defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive." 19 This general understanding also applies in criminal cases, where the burden of proof is considerably higher than in a civil action. 20

If circumstantial evidence and inferences therefrom suffice to prove intent beyond a reasonable doubt in criminal trials, it should certainly satisfy this Agency's standard in a civil licensing matter. Construing the record before us as lacking "probative evidence" on the question of deceit amounts to calling for a record that contains a confession of intent to deceive or requiring the Commission find direct evidence of deceit. This is a nearly impossible burden to put on the F.C.C.'s bureaus and judges and renders the bar on misrepresentation unenforceable except in the most extreme cases. It would also have the effect of requiring more evidence of deceit at the pleading stage at the F.C.C. than is required to win a Title VII case or convict a defendant at trial in Federal court.

C. The Majority Errs when it Requires the ALJ to Enter Findings Stating

Witnesses Lack Credibility Prior to Making Adverse Rulings if the Credibility Determinations are Implicit in the Adverse Ruling.

The ALJ found Liberty's arguments, "strained credulity." 21 The majority concluded this finding, together with the ALJ's finding that Liberty lacked "any basis" for certifying the site's availability did, "not constitute credibility findings." 22 The majority's conclusion, that the absence of an express finding regarding the credibility of Liberty's witnesses weakens the ALJ's ultimate disposition, is unsupported by any citation to a rule or case that requires that an ALJ enter an express finding regarding witness credibility. 23 While such findings may be preferred, the majority should not create such a duty out of thin air.

Only the ALJ can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the Commission may well find error even in a finding purportedly based on a credibility determination. 24 But when an ALJ's finding is based on a decision to credit testimony that tells a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can almost never be error.

I am at a loss to explain how the ALJ's rejection of Liberty's testimony and explicit finding that its position on the evidence, "strained credulity," can be held to be an inadequate credibility finding. 25 The strongly worded findings and conclusions entered by the ALJ, and affirmed by the Review Board, leave no doubt

that Liberty's witnesses were not only lacking in credibility, but were disbelieved and thought to have testified falsely.

It is an inescapable inference from the ALJ's findings and conclusions entered that any credibility issues were resolved against Liberty.

Conclusion

The majority opinion constitutes an unwise use of our de novo review power. De novo review is not for the purpose of retrying the matter. While the site owner may not have testified at the hearing, the ALJ did hear from two of three key witnesses. The majority has thus exchanged a result that turned on credibility assessments made by a judge, who heard the testimony from two of three witnesses, for a result made by four Commissioners who did not hear from a single witness. Surely the ALJ is better positioned than this Commission to decide the issue in question. 26 The majority's disposition does not reduce the likelihood of erroneous deprivation of rights in the future nor does it prescribe improved due process in the future. Thus it does not comport with the usual purpose of de novo review, which is to clarify the application of legal standards to facts.

Direct conflicts in sworn testimony, and documentary evidence surely constitutes "probative evidence." A finding that Liberty had, "no basis," for its certification to the Commission and that its argument, "strained credulity," is sufficiently clear to constitute any necessary credibility determination. The Commission, after expending its ALJ resources in a week long hearing, should be reluctant to substitute its own view of the facts in the absence of a wildly implausible result. Here, the majority sends the wrong enforcement message to licensees and wrong procedural message to its judges. The ALJ's findings and conclusions, as affirmed by the Review Board, are not implausible and should be affirmed.

FOOTNOTE:

1 The ALJ also disqualified BFBFM on site issues. The parties filed exceptions with the Commission's former Review Board. The Board affirmed the ALJ's disqualification of both applicants on site availability issues.

National Communications Industries, 6 FCC Rcd 1978 (Rev. Bd. 1991).

2 National Communications Industries, 7 FCC Rcd 1703 (1992), recon. denied, Liberty Productions, 7 FCC Rcd 7581 (1992), recon. dismissed, 8 FCC Rcd 4264 (1993).

3 10 F.3d 875 (D.C. Cir. 1993).

4 FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), modified, 9 FCC Rcd 6689, further modified, 10 FCC Rcd 12182(1995).

5 Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses (First Report and Order), 13 FCC Rcd 15920 (1998), recon. denied, 14 FCC Rcd 8724 (1999), aff'd sub nom. Orion Communications, Ltd. v. FCC, 213 F.3d 761 (D.C. Cir. 2000).

6 Orion Communications Ltd. v. FCC, 131 F.3d 176 (D.C. Cir. 1997).

7 Liberty Productions, Inc., 14 FCC Rcd 7637 (OGC 1999).

8 Id, a 7640 * 6.

9 Each of the above-captioned long-form applicants filed a short-form application (FCC Form 175) by August 20, 1999.

Skyland, however, did not meet the up-front payment deadline and thus was unable to bid in the auction.

Public Notice, DA 99-1912, Attachment C (Non-Qualified Bidders) at 3 (Sept. 17, 1999).

10 Liberty Productions, FCC 99I-23 (OGC rel. Nov. 23, 1999). The following pleadings relating to the site certification issue have been filed: (a) Supplemental Brief filed on December 23, 1999 by Liberty Productions; (b) Response to Supplemental Brief filed on January 7, 2000 by Orion Communications Ltd.; (c) Opposition to Supplemental Brief filed on January 7, 2000 by Biltmore Forest Broadcasting FM, Inc.; (d) Response to Supplemental Brief filed on January 7, 2000 by Willsyr Communications; (e) Reply to (Orion's) Response to Supplemental Brief filed on January 24, 2000 by Liberty Productions; (f) Reply to BFBFM's Opposition to Supplemental Brief filed on January 21, 2000 by Liberty Productions; (g) Reply to (Willsyr's) Response to Supplemental Brief filed on January 21, 2000 by Liberty Productions; (h) Motion to Dismiss Liberty's Replies filed on February 7, 2000 by Orion; and (i) Opposition to Motion to Dismiss filed on February 17, 2000 by Liberty Productions.

11 The following pleadings have been filed: (a) Opposition to Amendment filed on November 22, 1999, by Orion Communications Ltd.; (b) Reply to (Orion's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (c) Motion to Strike Reply to Opposition to Amendment filed on December 29, 1999, by Orion Communications Ltd. (d) Opposition to Amendment filed on November 22, 1999, by Willsyr Communications; (e) Reply to (Willsyr's) Opposition to Amendment filed on December 3, 1999, by Liberty Productions; (f) Motion to Strike Reply to Opposition filed on January 3, 2000, by Willsyr Communications; (g) Consolidated Opposition to Motions to Strike filed on January 10, 2000, by Liberty

Productions; and (h) Reply to Opposition filed on January 19, 2000 by Willsyr.

12 The following motions to enlarge issues, and responsive pleadings, are pending before the Commission: (a) Motion to Enlarge Issues filed on November 12, 1999, by Biltmore Forest Broadcasting FM, Inc; (b) Opposition to Motion to Enlarge Issues filed on November 26, 1999, by Liberty Productions; (c) Reply to Opposition filed on December 7, 1999, by Biltmore Forest Broadcasting FM, Inc.; (d) Motion to Enlarge Issues Against Liberty Productions filed on November 12, 1999, by Orion Communications Ltd.; (e) Opposition to Motion to Enlarge Issues and Motion for Leave to File Out Of Time, filed on November 29, 1999, by Liberty Productions; (f) Supplement to Opposition filed on December 3, 1999, by Liberty Productions; (g) Motion to Enlarge The Issues filed on November 24, 1999, by Willsyr Communications; (h) Opposition to Motion to Enlarge Issues filed on December 3, 1999, by Liberty Productions; (i) Reply to Opposition of Liberty filed on December 13, 1999, by Willsyr Communications; (j) Second Motion to Enlarge The Issues filed on December 13, 1999, by Willsyr Communications; (k) Opposition to Second Motion to Enlarge The Issues filed on December 23, 1999, by Liberty Productions; and (1) Reply to Opposition of Liberty filed on January 3, 2000, by Willsyr Communications.

13 Liberty Productions, FCC 00I-01 (Jan. 14, 2000).

14 The following pleadings have been filed: (a) Comments on Basic Qualifications Issues Concerning Liberty Productions, A Limited Partnership, filed on February 14, 2000 by the Enforcement Bureau; (b) Reply, filed on February 29, 2000 by Liberty Productions; (c) Reply to Enforcement Bureau's Comments, filed on February 29, 2000 by Biltmore Forest Broadcasting FM, Inc.; (d) Response to Comments of the Enforcement Bureau, filed on February 29, 2000 by Willsyr

Communications; and (e) Reply Comments, filed on February 29, 2000 by Orion Communications Ltd.

15 The following pleadings have also been filed: (a) Memorandum In Support of Joint Request for Approval of Settlement, filed November 14, 2000 by Biltmore Forest Broadcasting FM, Inc.; (b) Memorandum In Support of Joint Request for Approval of Settlement, filed November 17, 2000 by Liberty Productions; (c) Supplement to Joint Request for Approval of Settlement, filed November 20, 2000 by Liberty Productions; (d) Opposition to Joint Request for Approval of Settlement, filed November 29, 2000 by Willsyr Communications; (e) Partial Opposition to Joint Request for Approval of Settlement, filed November 29, 2000 by Orion Communications Ltd.; (f) Opposition to Joint Request for Approval of Settlement, filed December 5, 2000 by the Enforcement Bureau; (g) Consolidated Reply to Oppositions, filed December 11, 2000 by Biltmore Forest Broadcasting FM, Inc.; (h) Consolidated Reply to Oppositions, filed December 11, 2000 by Liberty Productions; (i) Reply to Opposition, filed December 15, 2000 by Liberty Productions; and (j) Motion to Strike, filed January 8, 2001 by Orion Communications Ltd.

16 Under the proposed settlement Liberty would receive: (a) up to $170,000 in reasonable and prudent expenses in prosecuting its application; (b) up to $27,000 for its potential obligation for expenses related to the interim operation; and (c) $50,000 or such lesser amount as the Commission may approve representing interest owed on a loan made by Cumulus Broadcasting to Liberty and origination costs paid by Cumulus. The agreement also contemplates a three-year consulting agreement between BFBFM and Liberty's general partner, Valerie Klemmer, whereby she will sign a covenant not to compete and will be paid $75,000 in exchange for providing a maximum of 50 hours of consulting services to the station each month.

17 On its short-form application BFBFM claimed a 35 percent new entrant bidding credit, as did each of the other applicants filing short-form applications in this proceeding.

18 In adopting auction rules to govern the resolution of the frozen comparative cases, the Commission indicated its intent to offer the permit to the next highest bidder, rather than conduct a further auction, because this would be more expeditious. First Report and Order, 13 FCC Rcd at 15952 * 86, 15953 n.81.

19 See Liberty Productions, 14 FCC Rcd 7637, 7640 * 6 (OGC 1999), providing that the hearing proceeding would resume to consider, inter alia, "the question concerning BFBFM's repre. entations as to the availability of its transmitter site." The settling parties urge that this matter can be expeditiously resolved since no issue was ever designated for hearing.

Quick resolution of the concerns raised by the ALJ as to BFBFM's representations is, of course, possible. Another possibility, however, is that the Commission might conclude that there is a basis for specifying an issue. In that event, the case would be remanded for evidentiary hearings before an Administrative Law Judge. This would further delay resolution of this case.

20 Public Notice: Closed Broadcast Auction: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, FM and TV Translator Construction Permits Scheduled for September 28, 1999, 14 FCC Rcd 10632, 10639 (Jul. 9, 1999).

21 The certifications mandated by Section 1.2105(a) include the following: (1) certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act; (2) certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act; (3) certification that

the applicant is and will, during the pendency of the application, remain in compliance with any service-specific qualifications applicable to the licenses on which it proposes to bid; (4) an exhibit, certified as truthful under penalty of perjury, identifying all the parties with whom the applicant has an arrangement of any kind relating to the license to be auctioned; and (5) certification that the applicant has not entered into any arrangements with any other party regarding the amount of of their bids or bidding strategy. All of these certifications were included in Liberty's short-form application.

22 Public Notice Attachment B (Guidelines for Completion of FCC Forms and Exhibits), 14 FCC Rcd at 10697.

23 See First Report and Order. 13 FCC Rcd at 15976-47 * 146 ("After reviewing the short-form applications, the Bureaus will issue a public notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications").

24 See 47 C.F.R. 73.3564, providing that the acceptance for filing of an application does not preclude its subsequent dismissal, if it is later found to be patently in conflict with the Commission's rules.

25 The declaration is dated November 24, 1999 and is attached to Liberty's November 26, 1999 Opposition to BFBFM's Motion to Enlarge Issues.

26 See Public Notice, 14 FCC Rcd at 10698 ("[O]wnership information need not be provided for any limited partner that is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. In such case(s), the general partner shall certify under penalty of perjury, to the limited partner(s)' insulation, in lieu of providing the limited partner information").

27 See Section 1.2105(b)(2), permitting applicants to make minor changes in the short-form application after the resubmission period.

28 In this regard, the record before us reflects that the short-form application filed by Willsyr also omitted this same certification and that Willsyr was permitted to participate in the auction with impunity. See Public Notice: CLOSED BROADCAST AUCTION Status of Applications to Participate in the Auction, 14 FCC Rcd 14113, 14140 (Sept. 3, 1999), including Willsyr Communications, Limited Partner on the Accepted List as eligible to participate in the auction.

29 Public Notice: Closed Broadcast Auction, DA 99-2153 (Oct. 12, 1999). (announcing that any amendment to the long-form application would be due by November 10, 1999); Public Notice: Clarification Regarding the Resumption of Hearing Proceeding In MM Docket No. 88-577, DA 99-2355 (Oct. 28, 1999).

See also Liberty Productions, FCC 991-23 (OGC 991-23) (ordering the resumption of the hearing proceeding).

30 National Communications Industries, FCC 89M-1080 (ALJ rel. Apr. 5, 1989); Initial Decision, 5 FCC Rcd at 2866-67 * 39, 49-51.

31 First Report and Order, 13 FCC Rcd at 15987-89 (1998), noting that the site certification requirement, designed to deter the filing of frivolous and speculative applications that frustrated the Commission's processing goals, was no longer vital to the Commission's goal of expediting the initiation of new service to the public. See also Memorandum Opinion and Order, 14 FCC Rcd at 8732-33 * 16 (1999), advising pending applicants to carefully consider the impact of auction rules prescribing penalties in case of disqualification in deciding whether to participate in the auction.

32 Section 73.5004(a) provides generally that broadcast applicants are subject to the provisions of 47 C.F.R. . 1.2104(g) regarding payments upon disqualification.

33 First Report and Order, 13 FCC Rcd at 15956 * 99.

34 National Communications Industries, 5 FCC Rcd at 2866 * 39 (ALJ), affirmed, 6 FCC Rcd at 1979 * 11 (Rev. Bd.), review denied, 7 FCC Rcd 1703 (1992), recon denied, Liberty Productions, 7 FCC Rcd 7581 (1992), recon. dismissed, 8 FCC Rcd 4264 (1993).

35 First Report and Order, 13 FCC Rcd at 15942 * 57, citing 47 C.F.R. 1.2105(b)(2).

36 A new entrant bidding credit of 35 percent is available to bidders with no attributable media interests in any medium of mass communications. See 47 C.F.R. 73.5007(a). Media interests held by an individual or entity with equity and/or debt interests in the bidder will be attributed if the equity and debts interest(s), in the aggregate, exceed 33 percent of the total asset value of the winning bidder. See 47 C.F.R. 73.5008(c).

37 Amendment, Exhibit D.

38 Reply to Opposition, filed December 3, 1999, by Liberty Productions, at * 10.

39 Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licenses, 14 FCC Rcd 12541, 12545-46 * 10 (1999) (Hereafter Eligibility Order).

40 As discussed in greater detail below, a media interest held by Murray would be attributable, pursuant to Section 73.5008(c), if Murray were materially involved in the partnership's media-related

activities, or if his total equity contribution exceeded 33 percent of the total asset value (i.e., total debt plus total equity) of the applicant.

41 See also Liberty Productions, FCC 991-23, * 4 (OGC Nov. 23, 1999) ("Motions to enlarge filed in response to Liberty's November 10, 1999 amendment must be filed by November 26, 1999"). Willsyr timely filed a motion to enlarge issues on November 24, 1999.

42 Amendment, filed on November 10, 1999 by Liberty, at Exhibit C. The Exhibit also states that its limited partner is not a creditor of the applicant.

43 Motion at 2. Elsewhere there is a reference to Liberty having "assumed in 1999 some $2 Million in debt from a broadcast group owner." Motion at 1. This makes it evident that Willsyr is referring to the Cumulus loan.

44 First Report and Order, 13 FCC Rcd at 15994-96 * 189-90; Memorandum Opinion and Order, 14 FCC Rcd at 8761-67 * 71-82.

45 Eligibility Order, 14 FCC Rcd at 12543-45 * 7-8.

46 Memorandum Opinion and Order, 14 FCC Rcd at 8762 * 71 ("For purposes of applying the general broadcast eligibility for the new entrant bidding credit in any future auction, we will apply those attribution rules as they exist at the time of the short-form filing deadline for that auction."); Eligibility Order, 14 FCC Rcd at 12542 * 3. See also Public Notice: New Rule Now In Effect Concerning Equity/Debt Threshold For Use With Determining Eligibility for New Entrant Bidding Credit, DA-1663 (Aug. 19,1999) ("The purpose of this Public Notice is to provide notification that OMB approval has been obtained and Federal Register publication occurred today, August 18, 1999. Therefore,

the new equity/debt threshold rule is now in effect Bidders participating in the September 28, 1999 Closed Broadcast Auction and seeking a New Entrant Bidding Credit are reminded that they will be subject to the [new] equity/debt threshold rule").

47 Public Notice: Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, 14 FCC Rcd 10632 (Jul. 9, 1999).

48 Id. at 10639.

49 Public Notice: Closed Broadcast Auction 224 Qualified Bidders, DA 99-1912, pp. 5-6 (Sept. 17, 1999).

50 14 FCC Rcd at 10637.

51 See Two Way Radio of Carolina, 14 FCC Rcd 12035 (1999), affirming, 12 FCC Rcd 958 (WTB 1997), upholding a staff action that had rejected a post-auction amendment purporting to increase the bidder's designated entity status, based on the applicant's mistaken calculation as to its small business size. Accord Clearcall Inc., 12 FCC Rcd 965 (WTB 1997).

52 See FCC Form 175, filed August 19, 1999, by Liberty Productions, Exhibits A and C.

53 Public Notice, DA-99-1346, Attachment B (Guidelines for Completion of FCC Forms 175 and Exhibits), 14 FCC Rcd at 10698, stating that "[o]wnership information need not be provided for any limited partner that is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. In such case(s), a general partner shall certify under penalty of perjury, to the limited partner(s)' insulation, in lieu of providing the limited partner information." See also Public Notice: Closed Broadcast Auction Ownership

Disclosure Requirements For Auctions Scheduled For September 28, 1999, 14 FCC Rcd 13283 (Aug. 10, 1999).

54 Amendment, submitted November 10, 1999, Exhibit C.

55 Section 73.3555, note 2(g)(1), of the multiple ownership rules provides for the attribution of a limited partnership interest unless "th[e] partner is not materially involved, directly or indirectly, in the management or operation of media-related activities of the partnership and the [applicant] so certifies."

56 Amendment, submitted for filing on November 10, 1999, by Liberty, Exhibit C.

57 She calculated total asset value as the combined equity investments of the general partner and the limited partner plus all debt. See Declaration, dated November 24 1999, at * 3-4. The Declaration is attached to Liberty's November 26, 1999 Opposition to BFBFM's Motion to Enlarge Issues.

58 Memorandum Opinion and Order, FCC 89M-1025 (ALJ Mar. 10, 1989).

59 A summary of the Judge's findings, with appropriate citations to the Initial Decision, is set forth in paragraph 8 of the Review Board's Decision. National Communications Industries, 6 FCC Rcd at 1979 * 8.

60 National Communications Industries, 6 FCC Rcd at 1979 *11, noting that the mere possibility that the site will be available is insufficient.

61 Id. at 1979 *12 ("Since Liberty is not basically qualified because of its disqualification on the site issue, we need not reach the issue of whether it misrepresented to the Commission when it

certified that a transmitter site was available, nor do we have to consider whether Liberty is entitled to any comparative credit...").

62 First Report and Order, 13 FCC Rcd at 15956 *99; Memorandum Opinion and Order, 14 FCC Rcd at 8732-33 * 16.

63 First Report and Order, 13 FCC Rcd at 15956 *99. See also Dorothy O. Schulze and Deborah Bingham, 13 FCC Rcd 3259, 3264 *14 (1998), aff'd sub nom. SL Communications v. FCC, 168 F.3d 1354, 1359 (D.C. Cir. 1999) (affirming the Commission's refusal to approve a settlement agreement that would have effectively granted an authorization to an applicant lacking character qualifications).

64 See Georgia Public Telecommunications Commission, 7 FCC Rcd 7996, 7999 n.29 (1992), citing Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985) (case in which exceptions concerning a particular issue were filed but never considered by the Review Board, the Commission found that it would be inappropriate to give a res judicata or collateral estoppel effect in future proceedings to the ALJ's adverse findings on that issue since they were not actually litigated to a final decision in which they were necessary to the outcome).

65 Swan Creek Communications v. FCC, 39 F.3d 1217 (D.C. Cir. 1994), citing, Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220, 1232 (D.C. Cir. 1993) ("'intent to deceive [is] an essential element of a misrepresentation or lack of candor showing'").

66 See Heidi Damsky, 13 FCC Rcd 11688, 11693 * 12 (1998), aff'd on other grounds, Heidi Damsky v. FCC, 199 F.3d 527 (D.C. Cir. 2000), citing Walnut Creek Honda Associates v. NLRB, 89 F.3d 645, 646 (9th Cir. 1996); Barker v. Shalala, 40 F.3d 789, 795 (6th Cir. 1994); WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141-42 (D.C. Cir. 1985).

67. TeleSTAR, Inc., 2 FCC Rcd 7352, 7353 * 11 (1987), citing Penasquitos Village v. NLRB, 565 F.2d 1074, 1078 (9th Cir. 1977).

68. See Heidi Damsky, 13 FCC Rcd at 11693 * 17 (noting specific findings by the ALJ that "[t]he Presiding Judge has had an opportunity to observe [HPI's] witnesses and finds their testimony forthcoming, candid, and entirely believable"); Dorothy O. Schulze and Deborah Bingham, 1 FCC Rcd 120, 124 (ALJ 1986), aff'd sub nom. SL Communications v. FCC, 168 F.3d 1354,1357 (D.C. Cir. 1999) (upholding ALJ's credibility findings rejecting testimony as "sheer fabrication" and a "web of lies") (intervening history omitted).

69. See, e.g., Mid-Florida Television Corp., 70 FCC 2d 281, 293-94 * 25 (Rev. Bd. 1975), settlement agreement approved, 49 RR 2d 1477 (1981), where the ALJ's observations were deemed untrustworthy because he had placed presumptive weight on the witnesses' status as practicing attorneys.

70. Initial Decision, 5 FCC Rcd at 2867 * 50.

71. Warner later explained that, although $4000 was higher than he had hoped, it was not unreasonable. (Tr. 878-79, 904) He knew there were other area sites where the rent would be lower. Those sites would be less economical in the long run, he advised, because they would entail costs that Klemmer would not face with the already developed Utter site. He was aware of what was available in the area because he had tried to find an alternate site for WCQS when access to its current site became a problem.

72. Warner testified that, although the duration of the lease was not discussed specifically, he inferred that Utter was amenable to a multi-year lease comparable to the lease for the existing television tower on her property. (Tr. 963)

73. Liberty's second site was the existing television tower located on Utter's property, already specified by Skyland, a competing applicant. The ALJ rejected Liberty's site amendment, finding that it was not supported by good cause inasmuch as it did not have reasonable assurance of the site (on Utter's property) specified in its August 31, 1987 application.

74. He did, however, explore the possibility of noncommercial station WCQS applying for the Biltmore Forest allotment and then working out a channel swap with a commercial station, because this would have helped with a third adjacent channel problem at the station's current frequency. (Tr. 951) He had also hoped that the owner of the station 's current transmitter site would apply for the FM allotment and would propose to use that same property for a transmitter site, thereby minimizing the possibility of station WCQS having to find another transmitter site because of the property's owner's growing ambivalence about the use of his property as a transmitter site. (Tr. 932)

75. At the time of the hearing, Warner was the general manager of station WCQS. We take official notice of the fact that Warner has signed the Engineering Exhibit to Liberty's November 10, 1999 amendment, identifying himself as a technical consultant. The record does not reflect whether Mr. Warner is still general manager of station WCQS.

76 The February 22, 1989 statement is attached to Liberty Exhibit 13 and is identified as Exhibit 1. (Liberty Exhibit 13 is a transcript of Vickey Utter's deposition.)

77 The March 13, 1989 statement is attached to Liberty Exhibit 13 (transcript of deposition) as Exhibit 2.

78 The March 29, 1989 statement is attached to Liberty Exhibit 13 (deposition transcript) as Exhibit 3.

79 But the record contains no evidence as to Utter's precise understanding of the lease in 1987; it is not inconceivable that she believed that she could agree to (or at least discuss) a future lease to be signed only if Orion, having failed to win the license, did not renew the lease for a second term.

80 We do not draw any adverse inferences from the fact that Ms. Utter, in contrast to Tim Warner and Valerie Klemmer, did not testify at the hearing. There is merit to the suggestion that Liberty, having subpoenaed Utter and having elected not to enforce that subpoena, cannot take advantage of her failure to appear. Liberty's failure to enforce the subpoena, however, cannot obscure the inconsistencies in Utter's various statements and deposition testimony and that, by her own admission, she has little recollection of the events in question. Indeed, Liberty was "happy" to rely on her deposition and statements precisely because it believed that, given her evident lack of recollection, it would get nothing further from her by forcing her to testify. We cannot fault Liberty for not enforcing the subpoena under these circumstances.

81 Our action herein denying the proposed settlement agreement is without regard to the allegedly improper statements contained in the responsive pleadings filed by Liberty and by BFBFM.

82 The issue concerns replies that Liberty filed in response to oppositions to its November 10, 1999 amendment. These replies, according to Willsyr and Orion, are unauthorized under Section 1.294 of the rules. As the Enforcement Bureau notes, however, Section 73.3522(b), 47 C.F.R. 73.3522(b), governing the filing of amendments to long-form applications, does not specifically authorize the filing of oppositions to such amendments. Furthermore, the Order, FCC 991-23 * 4 (OGC 1999), resuming the hearing proceeding in MM Docket No. 88-577 contemplated only that motions to enlarge issues could be filed in response to Liberty's November 10, 1999 amendment to its long-form application. Insofar as oppositions to that amendment raise

questions as to Liberty's basic qualifications, or otherwise request the denial of its long-form application, they are, in effect, motions to enlarge issues to which Liberty, clearly, is entitled to respond. See First Report and Order, 13 FCC Rcd at 15956 * 98, providing that the auction winner will have 15 days to respond to any new petitions to enlarge. Instead of dismissing the oppositions as unauthorized, as the Enforcement Bureau has suggested, we have considered the arguments raised in both the oppositions to the amendment and in the related replies. By doing so, we have given the unsuccessful bidders multiple opportunities to challenge Liberty's qualifications beyond what the rules specifically authorize but have, as a matter of fairness, also afforded Liberty ample chance to respond.

83 Orion requests that we dismiss on procedural grounds the separate replies that Liberty filed in response to the Oppositions filed by Willsyr, BFBFM and Orion. According to Orion, the delegated authority order, FCC 99I-23, rel. Nov. 23, 1999, according Liberty an opportunity to file a supplemental brief on the site issue contemplated that Liberty would file a single, rather than multiple, replies in response to any oppositions to its brief. However, the Order, * 7, specifies a deadline by which "replies MAY BE FILED," thus reflecting that multiple replies are authorized.

1 See e.g. American Communications Ass'n v. Douds, 339 U.S. 382, 411(1950) (noting that "courts and juries every day pass upon knowledge, belief and intent ... having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred").

2 In re Applications, 5 FCC Rcd. 2862, 2863(1990)

3 Id.

4 Id. at 2866-67; 2879; see also Memorandum Opinion and Order, at para. 55.

5 See Memorandum Opinion and Order, at n75.

6 See In re Applications, 5 FCC Rcd. at 2863.

7 See In re Applications, 5 FCC Rcd. at 2867; see also Id. at 2879 (ultimate conclusion of law).

8 See In re Applications II, 6 FCC Rcd. 1978(1991).

9 Id. at 1979.

10 Id.

11 Memorandum Opinion and Order, at para. 57.

12 Memorandum Opinion and Order, at para. 72.

13 Freytag v. Commissioner, 501 U.S. 868, 895(1991) (citing Wainwright v. Sykes, 433 U.S. 72, 90(1977)).

14 See Memorandum Opinion and Order at para. 71 ("admittedly troublesome"); para. 66 ("direct conflict").

15 "'Probative value' addresses the tendency of the evidence to establish a 'material' proposition." U.S. v. Bagley, 473 U.S. 667, n.5 (1985) (Marshall, J. dissenting)(citing E. Cleary, McCormick on Evidence 185 (3d ed.1984)); See also 1 J. Wigmore, Evidence 2 (P. Tillers rev. 1982).

16 See e.g. S&L Communications v. FCC, 168 F.3d 1354, 1355 (1999)(affirming FCC decision without explicit credibility findings on each witness, "The ALJ rejected as "sheer fabrication"--a "web of lies," as he also put it--the contrary

testimony of three S&B witnesses, including Schulze."); Saballo-Cortez v. INS, 761 F.2d 1259, 1264 (9th Cir. 1984); de Leon-Barrios v. INS, 116 F.3d 391, 393 (9th Cir. 1997).

17 See Swan Creek Communications, 39 F.3d 1217, 1222 (D.C.Cir. 1994); Fox River Broadcasting, Inc., 93 F.C.C.2d 127, 129(1983).

18 Leflore Broadcasting. Co., v. FCC, 636 F.2d 454, 462(1980).

19 Kimberlin v. Quinlan, 6 F.3d 789, 808(1993); see also United States v. Jackson, 513 F.2d 456, 461 (D.C.Cir.1975) (footnotes omitted); see also United States v. Bank of New England, N.A., 821 F.2d 844, 854 (1st Cir.) ("Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts."), cert. denied, 484 U.S. 943(1987); Mallette v. Scully, 752 F.2d 26, 32 (2d Cir.1984) ("Because intent is formed in the mind in secrecy and silence ..., a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case. Circumstantial evidence of this subjective fact is therefore indispensable."); United States v. Pope, 739 F.2d 289, 291-92 (7th Cir. 1984) ("Proof of the requisite state of mind need not be by direct evidence; it may be inferred from the surrounding facts and circumstances."); United States v. Hudson, 717 F.2d 1211, 1213 (8th Cir.1983) ("Willfulness, intent and guilty knowledge may also be proven by circumstantial evidence and frequently cannot be proven in any other way."); United States v. Childs, 463 F.2d 390, 392 (4th Cir.) ("Intent is not susceptible of direct proof; it must be proved by circumstances.") (footnote omitted), cert. denied, 409 U.S. 966, 93 S.Ct. 271, 34 L.Ed.2d 232 (1972); 2 Charles A. Wright, FEDERAL PRACTICE AND PROCEDURE 411 (2d ed. 1982) ("Though circumstantial evidence is used in virtually every criminal case, there are certain kinds of cases and issues on which it is almost indispensable, because it is so unlikely that direct evidence will be available. These include such matters as the

existence of a conspiracy, criminal intent, or other issues involving state of mind.") (footnotes omitted); 2 John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW 242, 244, 245 (Chadbourn rev. 1979) (intent, knowledge, belief, and state of mind may be evidenced by external circumstances and the defendant's conduct).

20 See generally, Kimberlin v. Quinlan; see also United States v. Maggitt, 784 F.2d 590, 593 (5th Cir.1986) (same); United States v. Harris, 558 F.2d 366, 369 (7th Cir.1977) (same); United States v. White, 557 F.2d 233, 236 (10th Cir.1977) (per curiam) (same).

21 In re Applications, 5 F.C.C. Rcd. at 2879.

22 Memorandum Opinion and Order, at para. 56.

23 The majority seems to be calling for a rule like that used in the immigration asylum context, where factfinders must explicitly enter findings on witness credibility prior to making an adverse determination on a petition. See e.g. Garcia-Ramos v. INS, 775 F.2d 1370, 1374-75 (9th Cir.1985); Argueta v. INS, 759 F.2d 1395, 1397-98 (9th Cir.1985).

24 See, e.g., United States v. United States Gypsum Co., 333 U.S. 364, 396(1948)(reversing trial court because documentary evidence outweighed credibility determinations).

25 See e.g. Anderson v. Sullivan, 914 F.2d 1121 (9th Cir. 1990)(rejecting claim that administrative factfinder must make explicit findings in absence of rule compelling such findings); United States v. Mastropierro, 931 F.2d 905, 906 (D.C.Cir.1991)(holding agency must apply and consider relevant factors rather than list findings on each factor to be in compliance).

26 See e.g. Miller v. Fenton, 474 U.S. 104, 114 (1985)(noting deference is owed to the judicial actor best positioned to decide the issue in question.).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1392 September Term, 2002

Biltmore Forest Broadcasting FM, Inc.,
Appellant Filed On: April 10, 2003

v.

Federal Communications Commission,
Appellee

Liberty Productions and Orion Communications Limited,
Intervnors

BEFORE: Ginsburg, Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed March 27, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1392 September Term, 2002

Biltmore Forest Broadcasting FM, Inc.,
Appellant Filed On: April 10, 2003

v.

Federal Communications Commission,
Appellee

Liberty Productions and Orion Communications Limited,
Intervnors

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1392 September Term, 2002

Biltmore Forest Broadcasting FM, Inc.,
Appellant Filed On: April 10, 2003

v.

Federal Communications Commission,
Appellee

Liberty Productions and Orion Communications Limited,
Intervnors

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of intervenor Orion Communications, Ltd.'s petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1392 September Term, 2002

Biltmore Forest Broadcasting FM, Inc.,
Appellant Filed On: April 10, 2003

v.

Federal Communications Commission,
Appellee

Liberty Productions and Orion Communications Limited,
Intervnors

BEFORE: Ginsburg, Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of intervenor Orion Communications, Ltd.'s petition for rehearing filed March 28, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

§ 1.2105 Bidding Application and certification procedures; prohibition of collusion.

(a) *Submission of Short-Form Application (FCC Form 175).* In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by public notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (*see*, e.g., 47 CFR 22.902), on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The short-form application must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership information, as set forth in § 1.2112.

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to § 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during th pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(vii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

(x) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owned to any Federal agency.

(xi) An attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owned to any Federal agency.

NOTE TO PARAGRAPH (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Short-Form Application (FCC Form 175). (1) Any short-form application (FCC) Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot b made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of

typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by public notice will have their applications dismissed with no opportunity for resubmission.

§ 73.5001. Competitive bidding procedures.

(a) Specific competitive bidding procedures for broadcast service and ITFS auctions will be set forth by public notice prior to any auction. The Commission may also design and test alternative procedures, including combinatorial bidding and real time bidding. See 47 CFR 1.2103 and 1.2104.

(b) The Commission may utilize the following competitive bidding mechanisms in broadcast service and ITFS auctions:

(1) *Sequencing.* The Commission will establish and may vary the sequence in which broadcast service construction permits and ITFS licenses will be auctioned.

(2) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding in broadcast service or ITFS auctions, the Commission will determine which construction permits or licenses will be auctioned simultaneously or in combination.

(3) *Reservation price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a broadcast construction permit or ITFS license subject to auction will be not awarded.

(4) *Minimum and maximum bid increments.* The Commission may, by announcement before or during broadcast service or ITFS auctions, require minimum bid increments in dollar or percentage terms. The Commission may by announcement before or during broadcast service or ITFS auction, establish maximum bid increments in dollar or percentage terms.

(5) *Minimum opening bids.* The Commission may establish a minimum opening bid for each broadcast construction permit or ITFS license subject to auction.

(6) *Stopping rules.* The Commission will establish stopping rules before or during multiple round broadcast service or ITFS auctions in order to terminate the auction within a reasonable time.

(7) *Activity rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 73.5002 Bidding application and certification procedures; prohibition of collusion.

(a) Prior to any broadcast service or ITFS auction, the Commission will issue a public notice announcing the upcoming auction and specifying the period during which all applicants seeking to participate in an auction must file their applications for new broadcast or ITFS facilities or for major changes to existing facilities. Broadcast service or ITFS applications for new facilities or for major modifications will be accepted only during these specified periods. This initial and other public notices will contain information about the completion and submission of applications to participate in the broadcast or ITFS auction, any materials that must accompany the applications, and any filing fee that must accompany the applications or any upfront payments that will need to be submitted. Such public notices will also, in the event mutually exclusive applications are filed for broadcast construction permits or ITFS licenses, contain information about the method of competitive bidding to be used and more detailed instruction on submitting bids and otherwise participating in the auction. In the event applications are submitted that are not mutually exclusive with any other application in the same service, such applications will be identified by public notice and will not be subjected to auction.

(b) To participate in broadcast service or ITFS auctions, all applicants must timely submit short-form applications (FCC

Form 175), along with all required certifications, information and exhibits, pursuant to the provisions of 47 CFR 1.2105(a) and any commission public notices. So determinations of mutual exclusivity for auction purposes can be made, applicants for non-table broadcast services or for ITFS must also submit the engineering data contained in the appropriate FCC form (FCC Form 301, FCC Form 346, FCC Form 349 or FCC Form 330). Beginning January 1, 1999, all short-form applications must be filed electronically.

(c) Applicants in all broadcast service or ITFS auctions will be subject to the provisions of § 1.2105(b) of this chapter regarding the modifications and dismissal of their short-form applications. Notwithstanding the general applicability of § 1.2105(b) of this chapter to broadcast and ITFS auctions, the following applicants will be permitted to resolve their mutual exclusivities by making amendments to their engineering submission following the filing of their short-form applications:

(1) Applicants for all broadcast services and ITFS who file major modification applications that are mutually exclusive with each other;

(2) applicants for all broadcast services and ITFS who file major modification and new station applications that are mutually exclusive with each other; or

(3) applicants for the secondary broadcast services and ITFS who file applications for new stations that are mutually exclusive with each other.

DA 99-1346
July 9, 1999

CLOSED BROADCAST AUCTION

Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999

Minimum Opening Bids and Other Procedural Issues

Report No. AUC-99-25-A (Auction No. 25)

1. INTRODUCTION

This Public Notice announces the procedures and minimum opening bids for the upcoming Closed Broadcast Auction.

. . . . . .

The terms contained in the Commission's rules, relevant orders and public notices are not negotiable. The Commission may amend or supplement the information contained in its public notices at any time, and will issue public notices to convey any new or supplemental information to bidders. It is the responsibility of all prospective bidders to remain current with all Commission Rules and with all public notices pertaining to this auction.

. . . . . .

2. ELIGIBILITY FOR NEW ENTRANT BIDDING CREDIT

A. General Eligibility Criteria

(3) Application Showing

Applicants should note that they will be required to file supporting documentation as Exhibits A and C to their FCC Form 175 short-form applications to establish that they satisfy the eligibility requirements to qualify for a New Entrant Bidding Credit.[25] Ownership information must also be provided in the Closed Broadcast Auction in order for us to verify eligibility to participate in the auction. Accordingly, **whether or not a New Entrant Bidding Credit is being sought, all participants must provide the information set forth in this section**. Specifically, for the Closed Broadcast Auction, applicants (or consortia of such applicants) will be required to file (in Exhibit A to their FCC Form 175 short-form application), a full and complete statement of the ownership of the bidding entity, to include all attributable interest holders. **The information must comply, in all material respects, with the ownership information appearing on the applicant's previously filed long-form application.** If the information reflects that there has been a change of control, the related long-form application will be dismissed and the applicant will be ineligible to participate in the auction.[26] The applicant must provide the ownership information for itself and its attributable

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[25] *See* 47 C.F.R. § 1.2105.

[26] *Broadcast First Report and Order*, 13 FCC Rcd at 15942 ¶ 57.

interest-holders, as defined by Section 73.3555 and Note 2 of that section, including: all officers and directors of a corporate bidder; any owner of 5% or more of the voting stock of a corporate bidder; all partners and limited partners of a partnership bidder, unless the limited partners are sufficiently insulated from the management or operation of the partnership; and all members of a limited liability company, except those sufficiently insulated from its management operation. Bidders must certify (in Exhibit A) compliance with the Commission's policies relating to media interests of immediate family members. **In addition, in those cases where a New Entrant Bidding Credit is being sought, a certification under penalty of perjury must be set forth in Exhibit C attesting to the eligibility of the bidder for the level of Credit claimed**. If the applicant is applying to bid as a consortium of applicants eligible for the New Entrant bidding Credit, this information must be provided for each consortium member. In cases where a joint bidding arrangement is contemplated, an Exhibit B must be filed. Applicants owned by minorities or women, as defined in 47 C.F.R. § 1.2110(b)(2) may attach an exhibit (Exhibit D) regarding this status. This information assists the Commission in monitoring the participation of "designated entities" in its auctions. applicants wishing to submit additional information may do so in Exhibit E (Miscellaneous Information).

. . . . . .

3. PRE-AUCTION PROCEDURES

A. Short-Form Application (FCC Form 175) – Due August 20, 1999, 5:30 p.m. ET

(2) Completion of the FCC Form 175

Applicants should carefully review 47 C.F.R. §§ 1.2105 and 73. 5002 and must complete all items on the FCC Form 175. Instructions for completing the FCC Form 175 are in Attachment B of this Public Notice. Applicants should not consider their form submitted to the FCC until they press the "Submit Form 175" button on the "Submit" page and receive confirmation from the filing system that the form has been received by the Commission.

. . . . . .

Attachment B

GUIDELINES FOR COMPLETION OF FCC FORMS 175 AND EXHIBITS

A. FCC Form 175

Because of the significance of the FCC Form 175 application to the auction, bidders should especially note the following:

Items 2-5: Give a street address (not a Post Office box number) for the applicant, suitable for mail or private parcel delivery. The FCC will send all registration materials and other written communications to th applicant at this address.

Item 8: Applicants must indicate their legal classification. The FCC Form 175 requires the applicant to classify itself as an individual, joint venture, partnership, trust, corporation, consortium, association, limited liability company (LLC) or government entity.

Item 9: Applicants are also requested to indicate their status as a rural telephone company, minority-owned business and/or women-owned business, so that the FCC can monitor its performance in promoting economic opportunities for these designated entities.

Item 10: Be advised that this is the sole opportunity applicants have to select New Entrant status and bidding credit level (if applicable), and there is no opportunity to change the election once the short-form filing deadline passes.

- Applicants that qualify for the New Entrant Bidding Credit should enter the applicable bidding credit (25 percent or 35 percent) in Item 10. Applicants should be aware that this is the sole opportunity that they will have to elect the appropriate bidding credit.

Item 11: Applicants should identify the File Number of the pertinent broadcast application (*i.e.*, FCC Form 301 for AM, FM and televisions stations; FCC Form 346 for LPTV and television translators, or FCC Form 349 for FM Translators) you have filed for the facility on which you seek bidding eligibility. Be advised that there is no opportunity to change this list once the short-form filing deadline passes.

Item 13: Applicants must list the name(s) of the person(s) (no more than three) authorized to represent them at the auction.

Only those individuals listed on the FCC Form 175 will be authorized to place or withdraw bids for the applicant during the auction.

Certifications: Applicants should carefully read the list of certifications on the FCC Form 175. These certifications help to ensure a fair and competitive auction and require, among other things, disclosure to the Commission of certain information on applicant ownership and agreements or arrangements concerning the auction. Submission of an FCC Form 175 application constitutes a representation by the certifying official that he or she is an authorized representative of the applicant, has read the form's instructions and certifications, and that the contents of the application and its attachments are true and correct. Submission of a false certification to the Commission may result in penalties, including monetary forfeitures, license forfeitures, ineligibility to participate in future auctions, and/or criminal prosecution.

Contact person: If the Commission wishes to communicate with the applicant by telephone or fax, those communications will be directed to the contact person identified on the FCC Form 175. Space is provided for a telephone number, fax number, and e-mail address. All written communication and registration information will be directed to the applicant's contact person at the address specified on the FCC Form 175. Applicants must provide a street address; no P.O. Box addresses may be used.

Completeness: Applicants must submit all information required by the FCC Form 175 and by applicable rules, including a certifying signature or manual filings. **Failure to submit required information by the resubmission date will**

result in dismissal of the application and inability to participate in the auction. *See* 47 C.F.R. § 1.2105(b).

NOTE: Applicants must press the "Submit Form 175" button on the "Submit" page to successfully submit their FCC Form 175.

Continuing Accuracy: Each applicant is responsible for the continuing accuracy and completeness of information furnished in the FCC Form 175 and its exhibits. *See* 47 C.F.R. § 1.65. applicants are reminded that Certification 6 on the FCC Form 175 includes consent to be audited.

B. Exhibits and Attachments

In addition to the FCC Form 175 itself, applicants must submit additional information required by the FCC's rules. Although the FCC does not require a particular format for this information, it has developed the following guidelines that will facilitate the processing of short-form applications.

. . . . . .

Exhibit A – Applicant Identity and Ownership Information: 47 C.F.R. § 1.2105(a)(2)(ii) requires each applicant to fully disclose the real party or parties-in-interest in an exhibit to its FCC Form 175 application. Each applicant applying for a New Entrant Bidding Credit must provide detailed ownership information for itself and its attributable interest holders, as defined by Section 73.3555 of the Commission's rules and by Note 2 to that Section. Ownership information must also be provided in the Closed Broadcast Auction in order for us to verify eligibility to participate in the

auction. Accordingly, **whether or not a New Entrant Bidding Credit is being sought, all applicants must provide the information set forth in this section.** The following information is required:

Ownership Information

Applicant Status	***Required Information***
Individual Applicant	Name, address and citizenship of the natural person seeking to hold in his or her own right, the authorization specified in the application.
Partnership applicants	Name, address and citizenship of all general partners and limited partners and the specific partnership interest held. However, ownership information need not be provided for any limited partner that is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership. In such case(s), a general partner shall certify under penalty of perjury, to the limited partner(s)' insulation, in lieu of providing the limited partner information.
Corporation	Name, citizenship, and address of the corporation and all officers and directors and all parties holding 5

	percent or more of the outstanding voting stock, and the amount and percentage held. Ownership information need not be provided for any shareholder with non-voting stock who is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the corporation. In such case(s), an officer shall so certify under penalty of perjury in lieu of providing the non-voting shareholder ownership information.
Limited Liability Company	LLC name and address; and names, addresses, titles, and citizenship of all members. Ownership information need not be provided for any member who is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the LLC. In such case(s), a managing member shall certify under penalty of perjury, to the member(s)' insulation in lieu of providing the information regarding the insulated member(s).
Trust	Name, address and citizenship of trustee
All applicants	With respect to the foregoing,

information must be provided for all attributable interest holders of the applicant as defined in Section 2.A.(1) and (3) of this Public Notice. (*See also* 47 C.F.R. § 73.3555 Note 2). *Also, bidders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members.* *See* Policy Statement, *Clarification of the Commission's Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992).

Supreme Court, U.S.
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(2)

No. 03-48

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Communications Commission's interpretation of its auction regulations for applications for a permit to construct a radio broadcast station.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997)	6
Bowles v. *Seminole Rock Co.*, 325 U.S. 410 (1945)	6
CBS, Inc. v. *FCC*, 453 U.S. 367 (1981)	10
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984)	10
Christensen v. *Harris County*, 529 U.S. 576 (2000)	6
FCC v. *National Citizens Comm'n for Broad.*, 436 U.S. 775 (1978)	10
FCC v. *NextWave Personal Communications, Inc.*, 123 S. Ct. 832 (2003)	9
Glover v. *United States*, 531 U.S. 198 (2001)	7
High Plains Wireless, L.P. v. *FCC*, 276 F.2d 599 (D.C. Cir. 2002)	6
Marshall v. *Jerrico, Inc.*, 446 U.S. 238 (1980)	9
McKay v. *Wahlemaier*, 226 F.2d 35 (D.C. Cir. 1995)	4, 9
NextWave Personal Communications, Inc., In re, 200 F.3d 43 (2d Cir. 1999), cert. denied, 531 U.S. 1029 (2000)	10
Superior Oil Co. v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969)	4, 9
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001)	8
United States v. *Boyle*, 469 U.S. 241 (1985)	8
United States v. *Correll*, 389 U.S. 299 (1967)	8

Cases—Continued: Page

United States v. *Larionoff*, 431 U.S. 864 (1977) 6
United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 10-11
United States v. *National Bank of Commerce*, 472 U.S. 713 (1985) 8
Verizon Communications Inc. v. *FCC*, 535 U.S. 467 (2002) 10
Ward v. *Village of Monroeville*, 409 U.S. 56 (1972) 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10

Statutes and regulations:

Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 258-265 2
11 U.S.C. 525(a) 9
47 U.S.C. 309 2
47 U.S.C. 309(j)(8)(A) 7
47 C.F.R.:
Section 1.2104(g)(1) 8
Section 1.2104(g)(2) 8
Section 1.2105(b) 11

Miscellaneous:

FCC, *Public Notice, DA 99-2153*, 14 F.C.C.R. 17,186 (Oct. 12, 1999) 3
FCC, *Public Notice, Broadcast Actions, Rep. No. 45,043*, 2001 WL 882264 (Aug. 7, 2001) 3
Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service License, In re, 13 F.C.C.R. 15,920 (1998), reconsid. denied, 14 F.C.C.R. 8724 (1999), review denied *sub nom. Orion Communications Ltd.* v. *FCC*, 213 F.3d 761, review denied, 221 F.3d 196 (D.C. Cir. 2000) (Table) 3

Miscellaneous—Continued: Page

National Communications Indus., In re Applications, 5 F.C.C.R. 2862 (1990), aff'd, 6 F.C.C.R. 1978 (1991), modified by, 7 F.C.C.R. 1703 (1992), remanded *sub nom. Biltimore Forest Broad. FM, Inc.* v. *FCC*, No. 92-1645, 1994 WL 116196 (D.C. Cir. Mar. 15, 1994) 2

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 2

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 321 F.3d 155. The opinion and order of the Federal Communications Commission (Pet. App. B1-B72) are reported at 16 F.C.C.R. 12,061.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2003. A petition for rehearing was denied on April 10, 2003 (Pet. App. C1-C4). The petition for a writ of certiorari was filed on July 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of an administrative licensing proceeding in which the Federal Communications Commission (FCC) had to select among mutually exclusive applications for a permit to construct an FM radio broadcast station in Biltmore Forest, North Carolina. The FCC granted the application filed by Liberty Productions (Liberty) and denied the applications filed by petitioner and others. The grant of the application followed Liberty's winning bid over the other applicant-bidders in an FCC auction.

1. In 1987, when petitioner and others filed their applications, the FCC's practice was to hold a comparative hearing to resolve whether an applicant met the threshold qualifications for a broadcast license and to determine which of the qualified applicants would best serve the public interest. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Biltmore Forest applications, therefore, were considered initially in an evidentiary hearing before an administrative law judge.[1] Before that proceeding became final, however, intervening statutory changes caused the FCC to adopt competitive bidding procedures, pursuant to 47 U.S.C. 309, to resolve pending applications, including the Biltmore Forest applications. See Pet. App. A5-A6.[2]

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[1] See *In re Applications: National Communications Indus.*, 5 F.C.C.R. 2862 (1990), aff'd, 6 F.C.C.R. 1978 (1991), modified by, 7 F.C.C.R. 1703 (1992), remanded *sub nom. Biltmore Forest Broad. FM, Inc.* v. *FCC*, No. 92-1645, 1994 WL 116196 (D.C. Cir. Mar. 15, 1994).

[2] In 1997, Congress amended 47 U.S.C. 309 to require the FCC to use competitive bidding procedures to decide among future mutually exclusive applications for new commercial broadcast station licenses and to permit the FCC to use those procedures for appli-

In 1999, the FCC conducted an auction for the Biltmore Forest license. Liberty won the auction. Petitioner's bid was second highest, followed by two other bids. See Pet. App. A6; FCC, *Public Notice, DA 99-2153*, 14 F.C.C.R. 17,186, 17,194 (Oct. 12, 1999).

After the auction, in accordance with its procedures, the FCC considered the losing applicants' objections to the grant of Liberty's application. The FCC determined that an omission from Liberty's pre-auction application concerning family media interests could be cured after the auction; that Liberty was a qualified bidder despite its loan agreement with a third party; and that the post-auction removal of Liberty's 35% bidding credit because of the loan did not require setting aside its win in the auction. Pet. App. B8-B28. In addition, the FCC rejected claims that Liberty had made misrepresentations to the agency at an earlier stage of the proceedings. *Id.* at B32-B43, B64-B65. After Liberty paid the gross amount of its final bid, the FCC granted Liberty's application and dismissed the unsuccessful bidders' applications, including petitioner's. FCC, *Public Notice, Broadcast Actions, Rep. No. 45,043*, 2001 WL 882264 (Aug. 7, 2001).

2. The court of appeals rejected the claims of the losing applicants, including petitioner, that Liberty

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cations pending before July 1, 1997, as were the Biltmore Forest applications. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 258-265. The FCC subsequently adopted rules to apply competitive bidding procedures to such pending applications. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 F.C.C.R. 15,920 (1998), reconsid. granted in part, 14 F.C.C.R. 8724 (1999), review denied *sub nom. Orion Communications Ltd.* v. *FCC*, 213 F.3d 761, review denied, 221 F.3d 196 (D.C. Cir. 2000) (Table).

should have been disqualified because its application was defective and because it had misrepresented facts to the FCC. Pet. App. A1-A6.

With respect to the contention that Liberty should have been disqualified for failing to submit required information to the FCC before the auction, the court of appeals held that the FCC reasonably interpreted its rules to treat that omission as curable after the auction. Pet. App. A10. The court "agree[d] with the Commission that it should not—more properly, that it need not—disqualify Liberty after the auction on the basis of an omission that, according to the Notice, would disqualify an applicant if discovered prior to the auction." *Ibid.* The court rejected claims that its decisions in *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), and *Superior Oil Co.* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969), required a different result. The court observed that those cases reversed the decision of the Secretary of the Interior to award a lease even though the Secretary had found the applications in question to be incurably defective. Pet. App. A10. Here, the court noted, the FCC reasonably reached the "opposite finding" that the omission of information from the application could be cured consistently with its rules. *Ibid.*

The court of appeals also found "quite reasonable" the FCC's conclusion that Liberty's amendment of its application after the relevant deadline, in order to reflect a loan agreement into which it had entered, was permissible under the agency's rules. Pet. App. A12. Although the loan agreement resulted in Liberty's losing its right to a new entrant bidding credit, so that it would have to pay the full amount of its bid rather than a discounted amount, the court, like the FCC, "fail[ed] to see how [Liberty's] mistake would have deprived the other auction participants of information

as to Liberty's valuation of the frequency, or would have otherwise influenced their bidding strategies." *Id.* at A13.

Finally, the court of appeals rejected, as lacking "any merit whatsoever," claims that Liberty should have been disqualified because of alleged misrepresentations to the FCC. Pet. App. A14.

ARGUMENT

Both of the questions presented in the petition turn on the contention that the court of appeals should not have deferred to the FCC's reasonable interpretation of its auction regulations because the FCC was acting as a "seller of licenses" in this case. Pet. 8. Petitioner raised that claim only in passing below, and the court of appeals did not address it. Nor does that claim—which petitioner characterizes as a "question of first impression" (*ibid.*)—warrant this Court's review. The court of appeals' deference to the FCC's reasonable interpretation of its own rules is consistent with the decisions of this Court and other courts of appeals.

1. In deciding not to disqualify Liberty, the FCC concluded that, although Liberty should have provided the information in question, known as the "family media certification," before the auction, Liberty could cure that omission after the auction. The FCC found that its auction rules and other statements did not provide adequate notice that an initial failure to provide the certification would be fatal to an application. See Pet. App. B8-B10. The court of appeals, in turn, upheld the FCC's conclusion that the dismissal of Liberty's application was not required under the agency's regulations, explaining that "[w]e give 'controlling weight' to the Commission's interpretation of its own regulation 'unless it is plainly erroneous or inconsistent with the

regulation.'" Pet. App. A9-A10 (quoting *High Plains Wireless, L.P.* v. *FCC*, 276 F.3d 599, 606 (D.C. Cir. 2002)).

This Court has articulated a similar standard. See, *e.g.*, *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945)); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); cf. *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) (deference is appropriate only when the regulation is ambiguous). Petitioner acknowledges that agency decisions of the sort at issue here "are normally entitled to substantial deference from reviewing courts." Pet. I. Petitioner contends that the same degree of deference is not warranted, however, "when the agency is selling licenses so as to become, in effect, an interested party in the licensing process." *Ibid.*

a. What petitioner now characterizes as "the central standard of review issue which calls out for intervention by this Court" (Pet. 13) was not addressed by the court of appeals. Nor did petitioner ask the court of appeals to address it. The issue was raised only as a rhetorical flourish in petitioner's principal brief below.

In the introductory paragraph of the "Argument" section of that brief, petitioner asserted that, "[w]ith the lure of capturing top dollar for licenses as the driving force in the FCC's decisions, any deference otherwise due the agency is no longer appropriate." Pet. C.A. Br. 16. Petitioner did not elaborate upon, or even refer to, that assertion anywhere else in its brief —not in the "Standard of Review" section, see *id.* at 14; not in the "Summary of the Argument" section, see *id.*

at 14-16; and not even in the "Argument" section under the heading "The FCC Was Obligated to Comply With Its Own Auction Rules," see *id.* at 16-22. Instead, in contending that the FCC's interpretation of its auction rules was not entitled to deference, petitioner argued only that "the FCC's interpretation is directly inconsistent with the plain language of the rule," *id.* at 21; *not* that the FCC's interpretation, even if not foreclosed by the rule's text, should not be accorded the customary degree of deference. Nor did the other parties advance such an argument. It is thus unsurprising that the court of appeals did not address whether any different degree of deference should apply in the auction context.

"In the ordinary course," this Court "do[es] not decide questions neither raised nor resolved below." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). The reasons that justify that approach are fully applicable here, notwithstanding petitioner's passing reference to the deference question in its appellate brief. In any event, whether or not the question was properly preserved, this Court's review is not warranted.

b. Petitioner's contention that the FCC's order is entitled to little, if any, deference rests on the erroneous premise that the FCC would gain financially by granting the winning bidder's application. In the first place, auction proceeds are not retained by the FCC, except to the extent necessary to offset the costs of developing and implementing the auction program. They are required by statute to be deposited in the Treasury's general fund. 47 U.S.C. 309(j)(8)(A).

Moreover, the government would have been entitled to *more* revenue, not less, if the FCC had disqualified Liberty and granted petitioner's application. Under the FCC's rules, a winning bidder, if disqualified, must

pay the difference between its bid and that of the second-place bidder *plus* a 3% penalty. 47 C.F.R. 1.2104(g)(1) and (2). Consequently, the FCC has no financial incentive, as petitioner suggests, to refrain from disqualifying the winner of an auction.

c. There is no basis in this Court's decisions for departing from ordinary deference principles simply because an agency is engaged in an activity, such as the conduct of auctions, that generates revenues for the United States. For example, this Court has accorded the same deference to the Internal Revenue Service as to other agencies not involved in such activity. See, *e.g.*, *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 218-220 (2001); *United States* v. *National Bank of Commerce*, 472 U.S. 713, 730 (1985); *United States* v. *Boyle*, 469 U.S. 241, 246 & n.4 (1985); *United States* v. *Correll*, 389 U.S. 299, 306-307 (1967). Such decisions, while not specifically addressing the question sought to be raised here, are inconsistent with petitioner's position that less deference should be given when an agency produces money for the Treasury.

Nothing in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), on which petitioner relies, suggests that the court of appeals erred in according deference to the FCC's interpretation of its auction rules. See Pet. 16. In *Ward*, the Court held that a defendant was deprived of due process when he was tried for a traffic offense before a mayor who was responsible for village finances and whose court, through fines, costs, and fees, provided a substantial portion of village revenues. 409 U.S. at 59. The Court based that holding on the mayor's "two practically and seriously inconsistent positions, one partisan and the other judicial," which created "a presumption of bias toward conviction" in order to generate revenues for the village. *Id.* at 60, 61.

Here, in contrast to *Ward*, the FCC acted solely in an administrative capacity, not a judicial capacity, in deciding whether to grant a license to the highest bidder. No conflict of interest exists when an agency, acting in an administrative capacity, seeks an outcome that provides the optimal return to the public. Cf. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-252 (1980). This case, moreover, involves the government's choice among competing applicants for a license, not a deprivation of liberty or property at the government's hands, as in *Ward*.

Petitioner's reliance on *FCC* v. *NextWave Personal Communications, Inc.*, 123 S. Ct 832 (2003), is also misplaced. *NextWave* held that the FCC was precluded by 11 U.S.C. 525(a), a provision of the Bankruptcy Code, from canceling a license for failure to make payments when due. The Court reasoned that the FCC's "policy preference * * * for canceling * * * licenses rather than asserting security interests in licenses when there is a default" could not overcome "rights provided by the plain terms of" Section 525(a). 123 S. Ct. at 840. No comparable question is presented by the present case. Petitioner does not contend that the FCC's action in granting the license to Liberty is inconsistent with any Act of Congress.[3]

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[3] Contrary to petitioner's suggestion, the court of appeals' decision in this case is not in tension with its own earlier decisions in *McKay* v. *Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), and *Superior Oil Co.* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969). See Pet. 12. In those earlier cases, the Secretary of the Interior issued a lease despite having found that the application was incurably defective. Here, as the court of appeals observed, the FCC had reasonably made the "opposite finding"—that the defect could be cured by amending the application. Pet. App. A10. In any event,

d. The Second Circuit has squarely rejected a claim similar to that raised by petitioner here. That court held that the FCC is entitled to deference in the interpretations of its auction regulations—even in a case, unlike this one, in which the FCC's interpretation produced a financial advantage to the government. *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 57-60 (1999), cert. denied, 531 U.S. 1029 (2000). The court rejected the argument that "the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled)" in that context. *Id.* at 58. The court reasoned that "[t]he financial benefits of the FCC's post hoc interpretation [of its rules] do not extinguish the courts' duty to give deference." *Id.* at 59.

2. There is likewise no merit to petitioner's assertion that the FCC is entitled to deference only on "technical matters" such as the "level of interference between co-channel radio stations." Pet. 14. This Court has not confined deference under the doctrines articulated in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984), and other cases to purely technical matters.

To the contrary, the Court has deferred to the FCC (and other agencies) in a wide variety of contexts. See, *e.g.*, *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467, 501-523 (2002) (FCC's rules for fostering competition in local telecommunications markets); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 390 (1981) (FCC's approach to implementing federal candidates' statutory right of access to broadcast stations); *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 813-814 (1978) (FCC's media diversification rules); *United States* v. *Midwest Video*

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this Court does not sit to resolve asserted intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Corp., 406 U.S. 649, 674 (1972) (FCC's cable rules) (opinion of Brennan, J.); *id* at 676 (Burger, C. J., concurring).

3. The second question presented in the petition—which asks whether the FCC "must * * * abide by the stated terms of the bidding process, or may * * * modify those terms after the auction" (Pet. I)—rests on the additional erroneous premise that the FCC changed its rules to issue the license to Liberty. See Pet. 11 (alleging "[t]he FCC's alteration of its auction rules after the close of bidding"). No change in the FCC's auction regulations occurred.

Rather, the FCC, construing its existing regulations, concluded that those regulations did not require that Liberty be disqualified for failing to submit the family media certification before the auction. The FCC reasoned that 47 C.F.R. 1.2105(b), which requires an applicant to provide certain certifications before an auction on penalty of dismissal of its application, does not apply to the family media certification. Pet. App. B9. The FCC further reasoned that the Public Notice of the Biltmore Forest auction did not clearly state that an omission of that certification could not be cured. *Id.* at B11. The court of appeals, applying appropriate deference, held that the FCC's construction was reasonable. *Id.* at A10. That holding is correct and presents no question of general significance that warrants this Court's review.[4]

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[4] Petitioner claims to have stopped bidding in the auction based on its prediction that Liberty would ultimately be disqualified. See Pet. 5, 11. The fact that petitioner pursued a high-risk strategy—assuming that it could obtain the license by challenging Liberty's qualifications rather than by making the highest bid in the auction—does not render this case any more suitable for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-48

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION FOR BILTMORE FOREST BROADCASTING FM, INC.

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PARTIES AND RULE 29.6 DISCLOSURES

The parties before the United States Court of Appeals for the District of Columbia Circuit were the petitioner here (Biltmore Forest Broadcasting FM, Inc.), the Federal Communications Commission, and intervenors Liberty Productions, L.P., and Orion Communications, Ltd.

Biltmore Forest Broadcasting FM, Inc., is a closely held North Carolina corporation without any subsidiaries or parent companies. No parent or publicly held company owns 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

Parties and Rule 29.6 Disclosures i
Table of Contents ii
Table of Authorities ii
Argument in Reply 1
Conclusion 5

TABLE OF AUTHORITIES

Page

Cases:

Biltmore Forest Broadcasting FM, Inc. v. FCC,
321 F. 3d 155 (2003) 1, 2
Bowles v. Seminole Rock Co., 325 U.S. 410 (1945) 3
In re NextWave Personal Communications, Inc.,
200 F.3d 43, 57-60 (2d Cir. 1999),
cert. den., 531 U.S. 1029 (2000) 3
Federal Communications Commission v.
Nextwave Personal Communications, Inc.,
537 U.S. 293 (2003) 3

Miscellaneous:

In the Matter of Requests for Refunds of
Downpayments Made in Auction No. 35,
17 FCC Rcd 6283 (2002) 2

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REPLY TO BRIEF IN OPPOSITION FOR BILTMORE FOREST BROADCASTING FM, INC.

ARGUMENT IN REPLY

A. The FCC argues that the issue of the degree of deference due to a rule interpretation by an interested administrative agency was not raised or ruled on below and hence should not be considered by this Court. (FCC Brief at 6-7). This is argument is easily refuted by reference to the text of Biltmore Forest Broadcasting FM, Inc.'s ("Biltmore") appellate brief. The lead argument in that brief squarely addressed at considerable length the facts that the FCC is heavily invested in raising the maximum amount of money

from its license auctions and that this circumstance has consistently shaped its decisions with respect to challenges to the basic qualifications of auction winners. (Petitioner's Court of Appeals Brief at p.16.) On this basis, Biltmore explicitly urged the Court of Appeals to accord no deference to the FCC's decision. *Id.* Biltmore went on to contrast the FCC's scrupulous application of the terms of its auction public notice in *NextWave*[1] (where strict adherence to the auction terms set forth in a public notice would garner it $16.3 billion) with its highly forgiving application of the terms specified for the auction at issue here (where lax application of the auction terms would yield it an additional $1,692,500.) The corruption of the FCC's motives by the desire to maximize the auction take was thereafter woven into the fabric of the auction-related arguments advanced by Biltmore, culminating in a conclusion that again expressly attacked the FCC decision as being financially motivated. Far from being a "rhetorical flourish," Biltmore's argument to the D.C. Circuit that no deference was due was integral to its appeal.

The Court of Appeals plainly understood that, and directly rejected the suggestion that no deference be accorded. On the contrary, the Court ruled that the disposition of the case hinged entirely on the "controlling weight" which must be given to the agency's interpretation of its regulations. (Petitioner's Brief, App. A-9-10.) The Appeals Court did not elaborate on the reasons for its rejection of the deference argument, but it may have simply

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[1] *In the Matter of Requests for Refunds of Downpayments Made in Auction No. 35*, 17 FCC Rcd 6283 (2002).

considered itself bound by the well-settled *Bowles v. Seminole Rock*[2] principle that deference is due to an administrative agency's interpretation of its own regulations. To be sure, Biltmore forcefully argued that the FCC's interpretation of a facially mandatory regulation as merely admonitory was inconsistent with the plain language of the rule and thus not entitled to deference, but that argument was in addition to, not in lieu of, the argument that the FCC's pecuniary interest undermined its entitlement to deference. In any case, there can be no doubt that the issue presented here was explicitly presented to the Court of Appeals and was adversely resolved by that Court.

B. The FCC also urges the Court to deny certiorari on the grounds that the Second Circuit Court of Appeals has addressed the issue presented to the Court here. *In re NextWave Personal Communications, Inc. v. FCC*, 200 F.3d 43, 57-60 (2d Cir. 1999), cert. den., 531 U.S. 1029 (2000). This is hardly a reason for this Court to forego review of the issue. The Second Circuit was simply following the *Bowles*-based principle of deference to administrative agencies which we are asking the Court to revisit. As noted in our Brief in chief, this Court did not in its own review of the *NextWave* situation defer to the FCC's interpretation of its regulatory authority in the bankruptcy context.[3] This obviously suggests, at a minimum, that the deference due an administrative agency should not be absolute, particularly

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[2] *Bowles v. Seminole Rock*, 325 U.S. 410 (1945).

[3] *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

when the agency is dealing with matters outside its core area of expertise.[4] It also suggests that the Second Circuit's posture of extreme deference to an interested agency may not be the current state of the law in this area.

C. The FCC next argues that this Court has historically applied deference principles even when the agency involved is raising money for the Treasury. (FCC Brief at p. 8.) However, the only examples the FCC can muster are regulations interpreted by the IRS. It may be that the IRS, whose entire purpose is to collect funds, is a special case. It makes no bones about serving the public interest – it unabashedly tries to gather the maximum amount of tax revenues, which is why a unique Tax Court was established by Congress to review many IRS decisions. In any case, the FCC duly acknowledges that none of the IRS cases cited actually address the issue raised here. Biltmore and the FCC agree that this is a case of first impression with this Court. The fact that the traditional deference rule has been uncritically applied for many years without examination of its underlying validity in the context of an interested agency is no reason to continue ignoring the issue now.

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[4] The FCC incorrectly suggests that Biltmore's view is that the FCC is only entitled to deference on "technical issues". (FCC Brief at 10-11) The FCC's expertise clearly extends to many telecommunications issues, both technical and non-technical, and Biltmore does not assert otherwise. But the application of the stated terms governing the conduct of an auction is not a telecommunications function at all. It is, rather, a matter of government contracts which falls nowhere within the FCC's peculiar expertise.

D. Finally, the FCC asserts that it did not actually change the auction rules after the auction was over. Examination of the pertinent public notices incontrovertibly demonstrates otherwise. The Public Notice issued by the FCC which established the ground rules for the auction explicitly required potential bidders to supply a key certification. The Notice explicitly stated that the material had to be submitted by a date certain and that, if it was not submitted by that date, the necessary consequence was inability to participate in the auction. See Petitioner's Appendix E-2, E-3, E-6 through E-10. After the auction was over, the FCC ruled that this material did not have to be submitted by the date previously specified but could be submitted after the auction was over, and that bidders who had failed to timely supply the information were nevertheless eligible to participate. (Petitioner's App. B-9-12.) There is simply no intellectually honest way in which this 180-degree reversal of position can be viewed as anything but a material change in a fundamental term of participation in the auction. Real bidders placed or did not place real bids in reliance on the eligibility rules stated before the auction began, and the FCC's reneging on the rules it had established thus caused an innocent bidder to lose.

CONCLUSION

The circumstances of this case happen to represent a particularly egregious case of an interested administrative agency grossly exceeding the bounds of permissible "interpretation." The outcome of the FCC's consideration of the case was so obviously result-driven (*i.e.*, revenue-driven) as to legitimately call into doubt the agency's ability to render an impartial judgment in matters of this kind. At a minimum, however, the rule requiring courts to defer to an

agency under these circumstances is ripe – perhaps beyond ripe – for review by this Court. The Petition should be granted.

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